Supreme Court, U.S.
FILED

041416 APR 21 2005

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No.

IN THE

Supreme Court of the United States

CITY OF CLEVELAND, PETITIONER

v.

ROBERT M. BECK, et al.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A clear split exists among the federal courts regarding the use of accrued compensatory time under the Fair Labor Standards Act, 29 U.S.C. §207(o)(5). It arises from lawsuits brought by municipal police officers alleging that public employers must grant date specific compensatory time requests and pay overtime to a substitute if their absence causes staffing to fall below minimum levels (*employee choice*). Public employers contend their traditional compensatory time agreements, which allow them to deny requests if staffing is at safe minimum levels and a substitute would have to be paid overtime, are permissible under the statute's unduly disrupt standard (*employer flexibility*).

The Fifth and Ninth Circuits and two district courts have adopted *employer flexibility* as the intent of Congress. The Sixth Circuit, three district courts, and the Department of Labor are on record as supporting *employee choice*, as they interpret the intent of Congress.

The question presented here is:

> Whether a compensatory time agreement between a public employer and its safety forces allowing compensatory leave requests to be denied when staffing is at minimum levels and a substitute would have to be paid overtime is permissible under the unduly disrupt standard in 29 U.S.C. §207(o)(5).

PARTIES TO THE PROCEEDINGS BELOW

DEFENDANT/APPELLEE/PETITIONER

City of Cleveland, Ohio

PLAINTIFFS/APPELLANTS/RESPONDENTS

Respondents are all patrol officers employed by the City of Cleveland. Collectively referred to as "police officers."

Robert M. Beck, John Kincaid, Harry Matlock, Walley Everett, William P. Evans, William Vanverth, James D. Kiefer, Douglas Carter, John J. Thomas, Richard E. Zembala, Leroy C. Brinkhoff, III, Steven J. Congelli, Robert L. Collins, Daniel B. Curran, Sr., Margery Gerbec, Damian Glaser, Gerald L. Hall, Bernard J. Horbol, Richard Kerber, Michael Kmiecik, Nelvyn Mauldin, Donald J. Meel, Rex A. Mehaffey, Frederick M. Mone, Jr., Dale Moran, John W. Mott, Theodore J. Polanski, Eugene Preston, Jr., Jacalyn Scharf, Michael Simon, Jeanie J. Staimpel, Michael D. Stone, Thomas A. Wise, Jerrold L. Zarlenga, Jr., Robert B. Preston, III.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Cleveland Police Department and the City of Cleveland, Defendants in the District Court and Appellees in the Court of Appeals, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in *Robert M. Beck, et al. v. Cleveland Police Department, et al.*, Sixth Circuit No. 02-3669 (November 12, 2004).

OPINIONS BELOW

The Court of Appeals' opinion is reported at 390 F.3d 912 (6th Cir. 2004) and is reproduced at Appendix 1a. A Motion for Rehearing or Hearing En Banc was

timely filed. The Court denied the motion but amended its Opinion to indicate that the Police Officers use an average of 15.2 eight hour days of compensatory leave per year. The decision is reproduced at Appendix 63a.

The District Court's opinion and order comprises two documents ruling on separate motions for Summary Judgment issued on June 19, 2001 and May 15, 2002. The decision of the District Court regarding the question presented was entered on June 19, 2001, and is reproduced in pertinent part at Appendix 31a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on November 12, 2004. A Petition for Rehearing or Hearing En Banc was denied on January 21, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves interpretation of the 1985 Amendments to the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §201, et seq., as codified in 29 U.S.C. §207(o) and the relevant implementing regulations, codified at 29 CFR §§553.20-553.28.

29 U.S.C. §207(o)(5) governs use of accrued compensatory time. The statute states:

> (5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency –
> (A) Who has accrued compensatory time off authorized to be provided under paragraph (1), and
> (B) Who has requested the use of such compensatory time, shall be permitted by the

> employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

Congress authorized the Department of Labor ("DOL") to issue any necessary implementing regulations. P.S. 99-150, §6 (1985) Public employers and employee representatives participated in the hearings. The terms "reasonable period" and "unduly disrupt" were defined as follows:

> (c) Reasonable Period. (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.

Title 29 CFR §553.25(c). (App. 82a)

> (d) Unduly Disrupt. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (*See* H. Rep. 99-331, p. 23). For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it

> would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

Title 29 CFR §553.25(d). (App. 82a, 83a)

STATEMENT

This petition seeks review of a decision from the United States Court of Appeals for the Sixth Circuit holding that a public employer violates FLSA Section 207(o)(5) when it denies an employee's date specific request to use accrued compensatory time because allowing the request would cause staffing to fall below the safe minimum level and require payment of overtime to a substitute. The court held a public employer may not deny such requests unless it makes a clear showing of undue disruption of its police services due to severe financial constraints. (App. 2a-3a)

The Respondents ("police officers") filed their lawsuit in the United States District Court for the Northern District of Ohio on May 27, 1999. Jurisdiction was claimed through Title 29 U.S.C. §216(b) and 28 U.S.C. §§1331 and 1337. Venue was appropriate under 28 U.S.C. §1391(b).

The police officers are full-time patrolmen employed by the City of Cleveland. They are members of the Cleveland Police Patrolmen's Association, ("CPPA"), whose President is Robert Beck. Their wages, hours, terms, and conditions of employment have been negotiated by the CPPA for more than three decades. The City and the CPPA, at all pertinent times, were parties to a collective bargaining agreement authorizing the City to pay Respondents

overtime in the form of compensatory time as permitted by FLSA §207(o). (App. 5a, 6a)

The agreement provides alternative ways of paying compensatory time depending on whether the officers have accumulated the statutory 480 hour limit. (App. 66a) 29 U.S.C. §207(o)(3) If under 480, they can choose either 90 minutes compensatory time for each overtime hour or one hour cash payment and 30 minutes of compensatory time. Those who have accumulated 480 hours are paid cash at time and one-half. (App. 6a)

The operative portion of the CBA with regard to use of compensatory time provides as follows:

> Compensatory Time Off. Compensatory time off shall be granted in accordance with operational needs and upon reasonable request by the employee requesting such compensatory time off. Requests for the use of accumulated compensatory time will be considered and granted to the employee who first requested the time off, unless an emergency exists.
> (App.6a)

The term "operational needs" is understood by the CPPA and the City to mean the minimum number of officers needed to effectively and efficiently provide services. (App. 6a) The number of officers needed is referred to as the "car plan." (App. 36a) The City, as a management right, is authorized to determine the manpower each district needs to fill the car plan and effectively and efficiently provide service. (App. 36a)

The Cleveland Police Department has employed the same procedures for requesting compensatory time use for decades. Any police officer wishing to use accrued compensatory leave is required to sign a log

book on the date it is desired. The supervisor for each shift reviews the anticipated need for officers on that date, the number of officers available, and allows those in excess of the minimum required level to take compensatory leave. The minimum required level is the point at which safety becomes a concern and another vacancy would require the Department to call an off duty officer who would be paid overtime. The City's policy is not to allow compensatory time to be used if overtime is required. (App. 7a, 36a)

The police officers' complaint alleged violations of several FLSA provisions, including §207(o)(5). They claimed that §207(o)(5) is ambiguous and the court is therefore required to defer to DOL interpretations which compel the conclusion that an officer can choose a specific day for compensatory time use, and that the request must be granted unless the City can prove the Police Department's operation will suffer undue disruption. (App. 46a) Further, based on the DOL interpretations, the police officers alleged that undue disruption can never arise if a substitute from another shift or division is available to work overtime. This interpretation was adopted by several district courts.[1]

The police officers filed a Motion for Summary Judgment claiming the DOL's interpretations must be given legal effect. Its motion was supported with deposition testimony claiming Cleveland routinely denies their compensatory leave requests. (App. 8a) They offered no statistics on compensatory time use in

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[1] *Debraska v. Milwaukee*, 131 F.Supp.2d 1032 (E.D. Wisc. 2000); *Canney v. Brookline*, 142 Lab. Cas. Par. 34, 169 (D. Mass. 2000); *Long Beach Police Assn. v. Luman*, 8 Wages & Hours Cas.2d (BNA) 1395 (C.D. Cal. 2001).

Cleveland to support their claim despite production of over 50,000 sheets of payroll records.

Cleveland filed its own motion for Summary Judgment claiming the CBA's use of "operational needs" as the determinative factor for compensatory time use complies with §207(o)(5). Cleveland argued the court should not defer to the DOL's interpretations as they are contrary to the cost saving intent of Congress and therefore, lack persuasiveness. Lastly, Cleveland supported its motion with statistics establishing that the officers actually enjoy liberal use of compensatory time. Each officer uses an average of 15.2 days of compensatory leave per year. (App. 47a)

The District Court granted Cleveland's motion finding that Section 207(o) and its implementing regulations are unambiguous, that the DOL's interpretations stray from the intent of Congress, and lack persuasive power. (App. 56a) The court stated that requiring overtime to be paid for tens of thousands of hours of compensatory leave would pose an unreasonable burden on Cleveland's ability to provide police services of acceptable quality and quantity. (App. 58a, 59a)

The Sixth Circuit reversed, becoming the first circuit court in the Nation to find that §207(o) and its implementing regulations are ambiguous. The first circuit to defer to the interpretations for clarification of the statute, and first to hold that compensatory time must be allowed on the specific date chosen by the employee. It is also the first to hold that payment of overtime to a substitute is not unduly burdensome on the budgets of public employers.[2]

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[2] The Sixth Circuit conceded that severe financial restraints could result in undue hardship, but that the City must make a clear

REASONS FOR GRANTING THE PETITION

Compensatory time agreements between the Nation's public employers and their safety forces almost uniformly deny compensatory time requests when staffing is at minimum levels and allowing an additional request would require calling a substitute for overtime. These agreements have been in effect since the adoption of Section 207(o). Currently, the circuit courts are divided on whether these agreements violate the compensatory time provisions of the Fair Labor Standards Act.

Petitioners believe the Sixth Circuit's decision in *Beck* is inconsistent with others by the Fifth Circuit in *Houston Police Officers' Union v. City of Houston*, 330 F.3d 298 (5th Cir. 2003), cert. denied, *Marticiuc v. City of Houston*, 540 U.S. 879 (2003), the Ninth Circuit in *Mortensen v. Sacramento County*, 368 F.3d 1082 (9th Cir. 2003), the Sixth Circuit in *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999), cert. denied, 528 U.S. 1157 (2000), and the District Court for the Southern District of New York in *Scott v. City of New York*, 340 F.Supp.2d 371 (S.D. N.Y. 2004).

In each of these cases, the plaintiffs (all police officers) sued a public employer claiming that Section 207(o), as interpreted by the Department of Labor, allows them to use accrued compensatory time on specific dates of their choice and requires public employers to grant the request if a replacement is available to work overtime. The Fifth and Ninth Circuits, the Sixth Circuit in *Aiken*, and the Southern District of New York found that Section 207(o)(5) does not require public employers to grant date specific

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showing of is financial difficulty before it will be excused from the obligation to pay overtime to a replacement. (App.3a)

requests for use of compensatory time. Each held that the employer can grant the specific request or assign another date as long as it is within a reasonable time after the request is made.

Municipalities in Ohio, Michigan, Tennessee, and Kentucky are faced with the proposition that their compensatory time agreements are illegal. The Sixth Circuit now requires them to pay overtime to a substitute to accommodate a compensatory time request unless it can be proven that the added cost imposes severe financial constraints on its ability to provide police services of adequate quality and quantity. As a consequence, future litigation over the employer's compensatory time decisions will always turn on the day-to-day financial condition of the agency, and not the law.

Meanwhile, municipalities in California, Oregon, Arizona, Washington, Texas, Mississippi, Louisiana, Montana, Idaho, Nevada, Alaska and Hawaii are permitted to proceed with their traditional agreements denying compensatory time requests at the point minimum safe staffing is reached and a substitute would have to be paid overtime.

Certiorari should be granted to resolve this critical question. Municipal officials need to prepare their budgets accordingly. If overtime must be paid to accommodate compensatory time requests, they must make policy decisions regarding how much police or fire protection they can afford or whether they should continue offering compensatory time in lieu of cash payment. They cannot continue to offer compensatory time agreements that are a catalyst for additional overtime, and endless litigation on whether municipal budgets are severely constrained.

I. LEGISLATIVE BACKGROUND OF THE 1985 AMENDMENTS TO THE FLSA UNDERSCORES THE NEED FOR GRANTING THIS PETITION.

The Fair Labor Standards Act was enacted in 1938 to protect the weakest of the labor force. It regulates child labor, minimum wages and maximum work hours. It made the 40 hour workweek a national standard for the purpose of creating new jobs. *Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1942). The Act accomplished these goals, but created unanticipated problems requiring Congress to occasionally intervene.

For example, this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) prompted Congress to adopt the Portal-to-Portal Act, 29 U.S.C. §§251, et seq. Congress estimated that the *Mt. Clemens* holding created potential employer liability in the billions of dollars, having a severe impact on the economy. (Kearns, The Fair Labor Standards Act, Pgs. 18-19).

In 1966, Congress determined a significant portion of the work force was not included, and amended the FLSA to include 1.4 million public employees working in hospitals and schools. (1966 U.S.C.C.A.N. 3003, 3004). In 1974, Congress extended FLSA coverage to most federal, state and local government employees. Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259 (1974). This Court, on principles of federalism, declared those provisions unconstitutional. *National League of Cities v. Usery*, 426 U.S. 833 (1976). In 1985, the Court reversed *National League of Cities* and extended FLSA requirements to most state and municipal

employees. *Garcia v. San Antonio Metropolitan Transit*, 469 U.S. 528 (1985).

Under *Garcia*, public employers who traditionally paid overtime with compensatory time off, were required to pay cash. Congress was quickly deluged with reports from political subdivisions that the added cost would have a devastating affect on their budgets. Many public employers and supporting organizations appeared before Congress requesting relief from overtime costs. Public employees and their supporting organizations also appeared arguing that the costs were not excessive. The Congressional Record is replete with eloquent pleas by many senators and congressmen that without relief, their constituent communities would face dire financial consequences.

Senator Nickles estimated the overnight cost to state and local governments to be about three billion dollars. He offered a compromise that would allow payment of overtime in the form of compensatory time noting time off would be preferable to stressful occupations such as police officers, firefighters and mental health counselors. (131 Cong. Rec. S10800-01)

Senator Wilson reported that, "Labor costs for public safety and fire protection comprise over one-half of the budgets for many local governments. The unforeseen cost increase in these services caused by the *Garcia* decision will force many local governments to siphon revenue from critical government programs to public safety, or, more seriously, reduce overall spending for these vital services." (131 Cong. Rec. S9489-03)

In the House of Representatives, the Honorable Harold E. Ford of Tennessee introduced a bill permitting law enforcement employees to take compensatory time off in lieu of receiving overtime pay.

He noted that local governments, without relief, would be faced with vast manpower shortages. Public safety would thereby be jeopardized and cities across the Nation would face substantial overtime expenses or scurry to develop innovative safety techniques. He offered his bill to grant relief to already strained city budgets. (131 Cong. Rec. E 4033-02)

Congress sought to balance the employee's right to make use of earned compensatory time and the public employer's need for flexibility. As a result, it provided a rule that permits the employee to use compensatory time within a reasonable period after requesting to do so, so long as its use does not unduly disrupt the agency's operations. 29 U.S.C. §207(o)(5); *see* S. Rep. No. 99-159 at 23.

Most Federal courts that have reviewed the 1985 Amendments have commented on the cost saving purpose. This Court recognized that the compensatory time provisions of §207(o) were adopted because of the concern expressed by many states and localities with the projected financial costs of coming into compliance with the FLSA's overtime provisions. *Moreau v. Klevenhagen*, 508 U.S. 22, at 26 (1993) (citing S. Rep. No. 99-159, Pg. 8 (1985)); *Christensen v. Harris County*, 529 U.S. 576, at 579 (2000). Also see, *Moreau v. Harris County*, 158 F.3d 241, at 245 (1998).

Other courts also preface their analysis of §207(o) by recognizing the statute's cost saving purpose. *Austin v. City of Bisbee, Arizona*, 855 F.2d 1429, 1435 (9th Cir. 1988) (noting Congress' concern over financial hardship on states and localities from complying with the FLSA). *Local 889 AFSCME Council 17 v. Louisiana Department of Health and Hospitals*, 145 F.3d 280, 285 (5th Cir. 1998) (Cognizant that many communities faced high tax burdens,

Congress was persuaded to give state and municipal governments the flexibility of utilizing compensatory time in preparing schedules for providing essential public services); *Collins v. Lobdell*, 188 F.3d 1124, 1129 (9th Cir. 1999) (Congress amended the FLSA and added the compensatory time provisions to ease the financial burden of complying with the FLSA on states and municipalities . . . public employers cannot pass the operating costs associated with overtime pay to consumers.); *Mortensen v. County of Sacramento*, 368 F.3d 1082, 1090 (9th Cir. Cal. 2004) (If Mortensen could force the county to pay another deputy overtime so that he could use his compensatory time off, then the [cost saving] purpose for §207(o) would be eviscerated.)

II. THE CIRCUIT COURTS, DISTRICT COURTS AND THE DEPARTMENT OF LABOR ARE SPLIT ON WHETHER *EMPLOYEE CHOICE* OR *EMPLOYER FLEXIBILITY* IS THE CORRECT INTERPRETATION.

A. The Compensatory Time Agreements Reviewed By The Fifth, Sixth And Ninth Circuits Are Identical In That Each Denies Requests For Compensatory Leave At The Point Minimum Staffing Levels Are Reached And Overtime Would Be Required.

The Fifth, Sixth and Ninth Circuits, and several district courts, have all reached conflicting decisions on the legality of compensatory time agreements that are essentially the same. While there are some procedural differences, each agreement shares a characteristic that is the catalyst for these lawsuits; each denies compensatory time at the point a substitute would be

called and paid overtime. A review of the pertinent agreements establishes their similarity.

Houston determines the availability of compensatory time by use of a "Red Book" that places a discretionary limit on the number of officers permitted off on a given day. *Houston Police Officer's Union v. City of Houston*, 330 F.3d 298, at 300. The discretion is "based on the shift commander's estimate of the days manpower needs." *Id.* The primary considerations in formulating needed manpower is the unit's anticipated work load (based on historical trends), the unit's efficiency, and the unit's ability to tolerate disruption in its operations. *Id.*, 300-301. If the minimum, safe level is not reached for the requested day, the compensatory time request is permitted. *Id.*, at 301. Closing the Red Book at that level relieves Houston of the need to call substitutes and pay overtime.

In Memphis, an officer requests compensatory leave by signing the precinct's compensatory time log book within 30 days of the requested date off. *Aiken v. City of Memphis*, 190 F.3d 753, 755. When the commanding officer, at his discretion, determines that further requests for that date would adversely affect the functioning of the unit, based on each particular case, subsequent requests are denied. *Id.* 756. Memphis acknowledged that its policy is not to grant overtime pay to one officer so that another can use compensatory time on a requested date. *Id.*

In Sacramento County, detention officers, who are not subject to the same demands from emergencies or special occasions as are patrol officers, request compensatory time by signing a leave book with a predetermined number of leave slots. *Mortensen v. Sacramento County*, 368 F.3d 1082, 1085. The number of leave slots are set by the County so that minimum

staffing levels are always retained. *Id.* When the open slots are taken further compensatory leave requests are denied. *Id.* Mortensen claimed that his request could not be denied unless the County showed undue disruption, and that if a qualified substitute is available, there is no undue disruption. *Id.*

The Milwaukee agreement required an officer to give reasonable advance notice of his intent to use compensatory time on a specific date. *Debraska v. City of Milwaukee*, 131 F.Supp.2d 1032, 1033 (E.D. Wisc. 2000). The commanding officer had the discretion to grant the request if the dates are "available . . . in accordance with the needs of the Police Service." *Id.*, at 1033. The requests were approved on a first-come, first-served basis. The City would not grant a compensatory time request if doing so required calling another officer to work overtime. *Id.*, at 1032.

The Sixth Circuit in *Beck* distinguishes Cleveland's compensatory time agreement from those in Houston, Sacramento County, and Memphis finding that Cleveland's "principal and motivating consideration for the denials was solely financial, i.e., the payment of overtime to substitute officers." (App. 24a) Even though Houston denied requests at the point overtime was required, its agreement was found "factually inapposite" to Cleveland. The Sixth Circuit declared that Houston's primary consideration was "the consequences on the unit's operations and ability to serve the city's and unit's needs," (App. 24a) even though it closes its leave books when overtime is required. There is no difference between Houston's primary consideration, as determined by the Sixth Circuit, and "operational needs" as used in Cleveland's agreement.

B. There Is A Severe Conflict In The Federal Courts As To How The Unduly Disrupt Standard Applies To Most Of The Nation's Compensatory Time Agreements.

The divergence of opinions regarding the legality of these compensatory time agreements arises from two diametrically opposed theories applying the term unduly disrupt.

Employees favor a system whereby the employer must grant their date specific requests unless doing so would cause undue disruption (*employee choice*). The element of *employee choice* that creates this controversy is the additional contention that payment of overtime to a substitute is not an undue disruption. *Employee choice* was adopted by the Sixth Circuit in *Beck*, and several other district courts. *Debraska v. Milwaukee*, 131 F.Supp.2d 1032 (E.D. Wis. 2000); *Canney v. Town of Brookline*, 142 Lab. Cas. P. 34, 169 (D. Mass 2000); *Long Beach Police Officers Association v. Luman*, 2001 U.S. Dist. LEXIS 25354, 8 Wage & Hour Cas.2d. (BNA) 1395 (C.D. Cal. 2001).[3]

Employers favor a system under which they retain the flexibility to schedule compensatory leave when its ability to provide services of sufficient quantity and quality will not be unduly disrupted (*employer flexibility*). This system gives the employer the ability to deny date specific requests if an additional absence would cause staffing to fall below an established minimum level and a substitute would be

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[3] The decision embracing *employee choice* in *Long Beach Police Officers Association*, is no longer good law in the Ninth Circuit. The decision in *Mortensen v. Sacramento County*, embracing *employer flexibility*, has effectively overruled *Long Beach*.

paid overtime. *Employer flexibility* was adopted in *Houston Police Officers Union v. City of Houston*, F.3d (5th Cir. 2003); *Mortensen v. Sacramento County*, 368 F.3d 1082 (9th Cir. Cal. 2004); *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999); *Scott v. City of New York*, 340 F.Supp.2d 371 (S.D. N.Y. 2004) and the District Court in *Beck v. Cleveland*. (App. 31a)

The courts adopting *employee choice* have done so by finding the terms reasonable period and/or unduly disrupt and the implementing regulations to be ambiguous. As a result, they deferred to DOL interpretations contained in a 1994 Wage and Hour Opinion Letter[4] (App. 87a) and an amicus brief filed in *Debraska v. Milwaukee*, 131 F.Supp.2d 1032 (E.D. Wis. 2000). (App. 90a)

The 1994 Opinion Letter, written nine years after enactment of §207(o)(5), is the first authoritative statement from the DOL fully supporting *employee choice*. It provides, "it is our position, notwithstanding an agreement between the Police Officers Association and the City, that an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive." (App. 87a)

One of the first courts to confront the claim that §207(o) intended *employee choice* for compensatory

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[4] 1994 WL 1004861.

time use was the District Court in *Debraska*.[5] The police officers argued that the FLSA required Milwaukee to grant their date specific requests if a substitute was available at overtime. *Debraska*, 131 F.Supp.2d, 1034. Milwaukee acknowledged that it did not pay overtime to a substitute and claimed that it complied with the statute by offering alternative dates within a reasonable period after denying a request. *Id.*, at 1032. The court invited the Secretary of Labor to file an amicus brief explaining the DOL's position. *Id.*, at 1033. The Secretary's amicus brief, filed in response, sets forth the groundwork followed by every court adopting *employee choice*. (App. 90a)

The Secretary's amicus brief finds *employee choice* is preferred relying on interpretations set forth in the preamble to the implementing regulations, and the 1994 Wage and Hour opinion letter, which it claims are entitled to considerable deference. (App. 96a, 97a) The Secretary further maintains that a Labor Department's interpretation of its own regulations are entitled to a high degree of deference if it is "merely . . . sufficiently connected to the rule's text." (App. 96a)

The Secretary reasoned that public employers must allow compensatory leave on the specific date requested by equating banked compensatory time with

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[5] Prior to *Debraska*, the Sixth Circuit considered a claim by Memphis police that under §207(o), they had the right to choose specific dates for use of compensatory time and that a substitute had to be called at overtime if necessary. *Aiken v. City of Memphis*, 985 F.Supp. 740, 745 (W.D. Tenn. 1997). The case was resolved in favor of the City based on the court's interpretation of "reasonable period." A dissenting opinion argued that the case turned on undue disruption, and that payment of overtime to a substitute is not unduly disruptive. *Aiken v. City of Memphis*, 190 F.3d 753, 762 (Ryan J., dissenting).

cash. (App. 99a) The amicus brief states, "An employee has the right to use compensatory time he receives . . . just as he has the right to use the cash he receives as overtime pay." *Id.* The theory that banked compensatory time is the equivalent of cash arises from the Eighth Circuit decision in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994).[6] *Heaton* is cited by the Secretary as follows:

> Banked [compensatory] time belongs to the employee. Section 207(o)(5) specifically gives the employee the right of access to and control of the use of that banked time subject only to the employer's right to deny requested uses by the employee that would unduly disrupt the employer's operation. As the employee would have the right to spend the employee's cash overtime pay when and as the employee chose, so the employee should be allowed to spend the banked compensatory time as the employee chooses, subject only that the employee not "unduly disrupt" the public employer's operations in doing so.

(App. 100a); *Heaton*, at 1180.

The Secretary asserts that employee choice of specific dates was intended by Congress. (App. 104a,

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[6] The holding in *Heaton v. Moore* equating comp time with cash in the bank was found wholly inapt by this Court in *Christensen v. Harris County*, 529 U.S. 576 (2000). *Heaton* was reviewed on the basis of conflict with the Fifth Circuit regarding the employer's authority to compel compensatory time use. Justice Thomas found that compensatory time is not like cash in the bank and the employer retains considerable control over use of accrued comp time. An employer can deny its use, compel its use or cash it out. *Id.* at 585, 586.

105a) The amicus brief cites Congressional reports claiming that Congress intended §207(o) to preserve "freedom and flexibility." (App. 100a) It concludes, "Allowing the employee to determine when to use compensatory time, subject only to providing adequate notice and not unduly disrupting an agency's operations, preserves this 'freedom and flexibility'". (App. 101a) The Secretary ignores that flexibility in the use of compensatory time was intended for the employer, not the employee.[7]

The City of Milwaukee argued before the district court that "reasonable period" as used in §207(o)(5) only requires a public employer to grant compensatory leave within a reasonable period after the request. *Debraska*, at 1032. The Secretary's amicus brief countered stating that, "The City's argument in this regard strains the language of section 7(o)[8]. In providing that an employee shall be permitted to use compensatory time 'within a reasonable period after making the request,' Congress obviously intended to prescribe a minimum notice requirement, not a maximum time after the date of the leave request that compensatory time may be used. (App. 105a) Despite the statute's clear language, the Secretary defined reasonable period as the amount

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[7] Congressional reports discussing enactment of §207(o) state that it was adopted in order "to provide flexibility to state and local government employers and an *element of choice* to their employees regarding compensation for statutory overtime hours." H.R. Rep. No. 331, 99th Cong., 1st Sess. 19 (1985). (emphasis added)

[8] The conflict is highlighted by the Fifth Circuit's comments in *Houston Police Officers Union* finding the City of Houston's interpretation of §207(o)(5), identical to Milwaukee's, to be grammatically appealing, and that the Houston police officers' claim, identical to the Secretary of Labor, to be the product of linguistic contortion. *Houston Police Officers Union*, at 303, 304.

of time between the date notice is given and the date requested. *Id.*

After declaring that §207(o) intends date specific requests, the amicus brief turns to the ultimate issue. Must the request be granted if it requires the agency to pay overtime to a substitute, or does the payment of overtime constitute an undue disruption? The Secretary concluded payment of overtime is not unduly disruptive. (App. 106a, 107a)

Support for this proposition cannot be found in the text of §207, or its implementing regulations. Instead, the amicus brief turns to dicta from *Heaton v. Moore*, stating that the payment of overtime compensation to other employees is not unduly disruptive, (App. 100a); *Heaton*, at 1181, the 1994 Wage and Hour opinion letter, and the preamble to the implementing regulations. (App. 96a, 97a); 52 Fed. Reg. 2012, 2017 (1987). These comments have no statutory source and did not result from notice-and-comment rule making.

The District Court in *Debraska* fully deferred to the Secretary's amicus brief. It distinguished *Aiken v. City of Memphis* on the basis that it did not have the enlightened guidance provided it by the Secretary. *Debraska*, at 1037. It found Milwaukee's compensatory time system illegal because it did not always allow date specific compensatory time requests and never called a substitute for overtime. Several district courts followed *Debraska*, deferring to the DOL interpretations. Supra, at Pg. 6, n. 1.

The District Court in *Beck v. Cleveland* was the first to decide that *employee choice* conflicts with Congress' intent in adopting the compensatory time provisions. It upheld *employer flexibility* declaring that the DOL's interpretations were unpersuasive. It

was the first court to determine that the expense of paying overtime to a substitute to accommodate compensatory time off would unduly disrupt a city's ability to provide police services of acceptable quantity and quality. (App. 31a)

The Fifth and Ninth Circuit Courts of Appeals subsequently rejected *employee choice*. The common ground for their rejection is that each refused to defer to the DOL interpretations relied on by *Debraska* and its progeny.

The Fifth Circuit in *Houston Police Officers Union* rejected *employee choice* declaring that the statute does not authorize compensatory time use as specifically requested by an employee. *Id.*, at 304. The court reviewed the statute's plain language, "an employee . . . who has requested use of such compensatory time shall be permitted by the employee's employer to use such time within a reasonable period after making the request . . .," and found:

> The text of *section 207(o)(5)* plainly defines the period between the date the employee submits his request and the date the employer allows the employee to use the comp time: the employee "shall be permitted . . . to use such [comp] time within a reasonable period after making the request." *29 U.S.C. §207(o)(5)*. As the City suggests, mandating a "reasonable period" for use of comp time is different from mandating the employee's chosen dates. The language offers a span of time to the employer, the beginning of which is the date of the employee's request.

Id., at 303.

The Ninth Circuit, in *Mortensen*, found the Fifth Circuit's analysis persuasive. It too refused the plaintiffs' invitation to adopt *employee choice* holding that §207(o) did not permit date specific requests for use of compensatory time. *Mortensen v. County of Sacramento*, 368 F.3d at 1084. *Mortensen* distinguished the *Debraska* line of cases because they deferred to the DOL interpretations without first determining whether the statute was ambiguous. *Id.*, at 1088, n 6. After making the required determination on ambiguity, *Mortensen* held:

> We conclude that the text of *§207(o)(5)* unambiguously states that once an employee requests the use of CTO (compensatory leave), the employer has a reasonable period of time to allow the employee to use accrued time. Because the statutory language is unambiguous, we need not defer to the regulations and opinion letter. *See Christensen, 529 U.S. at 587-88.*

Mortensen found this Court is in agreement with its decision to grant flexibility and control over accrued compensatory time to the public employer. *Id.*, at 1089. Noting that public entities can compel employees to use or cash out compensatory time if they so choose. *Id.*; See *Christensen v. Harris County*, at 585.

Mortensen also rejected the plaintiffs claim that a public employer must pay overtime to a substitute to accommodate his date specific request for compensatory time. Citing its own decision in *Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999), and this Court's decision in *Christensen*, it determined that forcing public employers to pay overtime would be unduly disruptive and would abridge the employer's flexibility. The court stated:

> If *Mortensen* could force the county to pay another deputy overtime so that he could use his CTO (compensatory leave), then the purpose for *§207(o)* would be eviscerated. This requirement would burden the county considerably by increasing the overtime that it must pay to employees. If implemented, *Mortensen's* proposed construction would remove the flexibility and control from the county that is clearly contemplated by the FLSA.

Mortensen, at 1090.

The District Court in *Beck* also rejected the *employee choice* rule. It refused to defer to the DOL interpretations after applying the rules of deference differently than the Fifth and Ninth Circuits. It found the definition of unduly disrupt as stated in the regulations to be unambiguous. (App. 55a) Citing *Christensen v. Harris County*, 529 U.S. 576 (2000), the court refused to defer to the DOL interpretations because they were not the product of formal adjudication or notice-and-comment rulemaking, and lacked persuasive power. (App. 54a)

Instead, the District Court analyzed the interpretations as instructed by this Court in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). It recognized Congress' cost saving intent, finding §207(o) was designed to ameliorate the burdens associated with necessary changes in employment practices caused by the imposition of the FLSA – particularly the overtime provisions – on public employers. (App. 55a) (Citing, *Moreau v. Klevenhagen*, 508 U.S. 22, 26 (1993); S. Rep. No. 99-159, p. 8 (1985). It recognized that *employee choice* is contrary to the cost saving intent because it is

a cost generator, and would be used by the officers to create additional overtime. The District Court found:

> Defendant persuasively argues that, if public employers knew that they would be required to pay overtime to substitute officers in order to accommodate each and every compensatory time request, the savings purpose of §207(o) would be defeated and no employer would enter into a compensatory time agreement. If plaintiffs are correct, the granting of compensatory time in lieu of cash compensation becomes merely a method for the creation of additional overtime. It would be less expensive for defendant to pay all overtime in cash in the first place than to pay it in compensatory time and then have to pay overtime compensation to substitute officers when that compensatory time is used. The Department of Labor's interpretation of §207(o) defeats the whole purpose of compensatory time. Thus, the Court does not find it has the power to persuade.

(App. 55a, 56a)[9]

The District Court easily concluded that imposing *employee choice* on Cleveland would be unduly disruptive. Cleveland established that its patrol officers enjoy the use of 188,000 hours of compensatory leave per year for a per officer average of 15.2 eight hour days. (App. 47a, 58a) Based on those statistics, the court found, "Requiring defendant to pay overtime

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[9] The Fifth Circuit in *Houston Police Officers Union* also found that the DOL interpretations failed to persuade the court that its interpretation of §207(o)(5) was incorrect. *Houston Police Officers Union*, 330 F.3d, at 305.

compensation for tens of thousands of hours so that officers can more readily use their compensatory time would impose an unreasonable burden on its ability to provide services of acceptable quality and quantity." (App. 58a, 59a)

III. THE SIXTH CIRCUIT, AND OTHER COURTS ADOPTING *EMPLOYEE CHOICE* HAVE IGNORED THE CLEAR LANGUAGE OF §207(o), MISAPPLIED THE LAW OF DEFERENCE, AND STRAYED FROM THE INTENT OF CONGRESS.

This Court has recently set forth a straightforward rule describing the type of deference to be applied to agency interpretations of a statute. *Christensen v. Harris County*, 529 U.S. 576 (2000); *United States v. Mead*, 553 U.S. 218 (2001). A court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute when it appears that Congress delegated authority to the agency to make rules carrying the force of law. *Mead*, at syllabus; *Christensen*, at 586, 587 (*citing*, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 844 (1984). Mandatory deference, however, is not extended to interpretations contained in opinion letters, policy statements, agency manuals, and enforcement guidelines, which are not the product of formal adjudication or notice-and-comment rulemaking. *Christensen*, at 587. Interpretations such as these are entitled to respect under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent they have the power to persuade. *Christensen*, at 587.

Chevron analysis requires a court to examine the statute and determine if Congress has directly spoken on the specific question at issue. *Chevron*, at 842. If

Congress' intent is clear, the matter is at an end and effect is given to Congress' unambiguously expressed intent. *Chevron*, at 842, 843; *Toledo Hospital v. Shalala*, 104 F.3d 79 (6th Cir. 1997).

All of the district courts that adopt *employee choice* cast aside the rules of deference to reach the desired result. *Debraska*, *Canney* and *Long Beach Police Officers Assoc.* fully defer to the opinion letter and amicus brief without determining whether the statute is ambiguous. *Mortensen v. Sacramento County*, 368 F.3d at 1088 n. 6.

The Sixth Circuit in *Beck* never considered the clarity of the statute itself. It claimed deference is permissible "when the language of the regulation is ambiguous." *Id.*, 919, citing *Auer v. Robbins*, 519 U.S. at 462. (App 14a) It granted deference finding, contrary to the District Court, that the regulation's definition of "unduly disrupt" is ambiguous. (App. 15a)

The Sixth Circuit's analysis is incorrect for two reasons. First, it finds unduly disrupt as defined in the regulation to be ambiguous because the Secretary's regulation, opinion letter, and amicus brief find the term ambiguous. (App. 15a) It also finds the DOL interpretations especially authoritative because "the regulation and its interpretations have been consistently applied since 1987." *Id.*[10] Second, the Sixth Circuit does not consider whether the agency interpretation goes beyond the meaning that the

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[10] This is a remarkable statement considering the opinion letter was written in 1994 and the amicus brief in 2000. The first court to recognize their existence was *Debraska* in 2000. *Employer flexibility* was the established rule since the adoption of §207(o)(5). The concept of *employee choice* first appears in *Aiken v. City of Memphis* in 1999.

statute can bear. *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 229 (1994). Deference is not extended to agency interpretations if it appears from the statute – or its legislative history – that the accommodation is not one Congress would have sanctioned. *Chevron USA*, 467 U.S., at 845.

The legislative history establishes that Congress did not intend the compensatory time provisions to be a vehicle for the creation of additional overtime. They were adopted to preserve municipal budgets by giving employers the flexibility to grant compensatory leave on a date of their choosing so long as it is within a reasonable period after the request. Congress would not have sanctioned a plan that in essence provides compensatory time on demand and requires payment of additional overtime to accommodate its use.

IV. THE IMPOSITION OF *EMPLOYEE CHOICE* WILL HAVE ENORMOUS FISCAL CONSEQUENCES FOR THE NATION'S LOCAL GOVERNMENTS.

The negative impact on municipal budgets, especially in large cities, from implementation of *employee choice* is enormous. The fiscal concerns addressed by Congress in adopting §207(o) are magnified by the prospect that compensatory time will be used by the employees as a method for the creation of additional overtime.

The District Court in *Beck* was the first to recognize that *employee choice* does not promote cost savings and is in fact a cost generator. The court correctly found that if employers knew they would be required to pay overtime to substitute officers to accommodate compensatory leave requests, they would not have agreed to use compensatory time. (App. 55a,

56a) It would be less costly to pay cash overtime in the first instance than to allow employees to take compensatory time on demand and create additional overtime. (App. 56a)

The proponents of *employee choice* are in essence imposing an *ex post facto* law, which eradicates the vast majority of the Nation's compensatory time agreements. The countless hours of compensatory time already accrued will become considerably more costly. Overtime budgets will increase depleting strained municipal treasuries, and will lessen the quantity and quality of services public employers will be able to afford.

These are the reasons that Congress quickly and unanimously adopted §207(o), and the reasons this issue, which is currently conflicting the Nation's courts, must be addressed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. 02-3669
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert Beck, et al.,
Plaintiffs-Appellants,

v.

City of Cleveland, Ohio,
Defendant-Appellee.

October 23, 2003, Argued
November 12, 2004, Decided
November 12, 2004, Filed

COUNSEL: ARGUED: Michael Leibig, ZWERDLING, PAUL, LEIBIG, KAHN & WOLLY, Alexandria, Virginia, for Appellants.

William F. Schmitz, JOHNSON & ANGELO, Cleveland, Ohio, for Appellee.

ON BRIEF: Michael Leibig, ZWERDLING, PAUL, LEIBIG, KAHN & WOLLY, Alexandria, Virginia, Patrick A. D'Angelo, Cleveland, Ohio, for Appellants.

William F. Schmitz, JOHNSON & ANGELO, Cleveland, Ohio, for Appellee.

JUDGES: Before: DAUGHTREY and GILMAN, Circuit Judges; HAYNES, District Judge. *

OPINIONBY: William J. Haynes , Jr.

OPINION: HAYNES, District Judge. Plaintiffs, Robert Beck, President of the Cleveland Police Patrolmen's Association, and past and present Cleveland Police Officers (the "Police Officers"), appeal the district court's final judgment dismissing their claims for violations of Section 207(o)(5) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(o)(5), by the defendant, City of Cleveland ("the City"). The district court granted the City's motion for summary judgment on the Police Officers' FLSA claims. The Police Officers' appeal is limited to their claims about the City's compensatory leave policy arising out of the denials of their requests for their accrued compensatory leave. The Police Officers contend that the district court erred by refusing to give controlling weight to opinions of the Secretary of the Department of Labor (DOL) that under the undue disruption rule in Section 207(o)(5), a municipality cannot refuse to honor a police officer's timely leave request solely to avoid payment of overtime to substitute police officers. The City contends that its compensatory leave system does not violate Section 207(o)(5) because Congress amended the FLSA to reduce the financial burdens of the FLSA upon governmental entities; that under Section 207(o)(5), the City can deny compensatory leave where the payment of overtime to substitute police officers would impose a financial burden upon the City; and that granting the officers' leave requests would result in

undue disruption of the City's police services within the meaning Section 207(o)(5).

For the reasons set forth below, we REVERSE the district court's judgment granting the City's motion for summary judgment on the Police Officers' compensatory leave claim and REMAND this action for additional factual findings on this claim. First, we conclude that the statutory phrase "unduly disrupt" in Section 207(o)(5) is ambiguous. Thus, we conclude that judicial deference is due to the Secretary's opinions that the payment of overtime to honor an officer's request for compensatory time does not qualify as unduly disruptive under Section 207(o)(5). Hence, the City cannot deny a timely compensatory leave request solely for financial reasons. In addition, from a review of this record, we conclude that the City has not proved that granting the Police Officers' otherwise timely requests for compensatory leave would result in an unreasonable financial burden and thereby cause an undue disruption of its operations. Absent a clear showing by the City of undue disruption of its police services, due to severe financial constraints to pay overtime to substitute officers, the City's denials of Police Officers' timely requests for accrued compensation leave must be held to violate Section 207(o)(5).

A. *Procedural History*

On May 27, 1999, several current and former Cleveland Police Officers n1 filed their complaint in the district court alleging that the City failed to comply with the FLSA. The Police Officers' specific claims were that the City miscalculated their regular rates of pay under the

FLSA, violated FLSA rules in denying compensatory leave, failed to pay for time spent transporting City vehicles, and placed illegal restrictions on their use of sick leave. The Police Officers also asserted that the City's violations were intentional, entitling them to liquidated damages. The City denied the Police Officers' allegations about its pay and leave practices.

With the parties' agreement, the district court bifurcated the action: first, to resolve the liability issue of whether the City's wage and hour practices in its police department violated the FLSA, and the second, if necessary, to determine the proper measure of damages for any violations. The parties also agreed to a discovery plan under which each police officer would respond to a questionnaire and after its review of the responses, the City would choose ten officers to depose as well as Robert Beck, the Police Officers' Union's president. The parties also agreed that those officers' depositions would be binding on all Police Officers in the action. Under the agreed discovery plan, the Police Officers deposed two City department supervisors who were responsible for time keeping and payroll.

Upon completion of discovery, both parties submitted cross-motions for summary judgment. The district judge referred the motions to a magistrate judge who filed a report and recommendation. Relying principally upon Aiken v. Memphis, 190 F.3d 753 (6th Cir. 1999), n2 the magistrate judge recommended that the district judge grant the City's motion for summary judgment, which included the Police Officers' FLSA claims about the City's compensatory leave practices. The Police Officers objected to the magistrate judge's report and recommendation, contending that the Secretary's

opinions on Section 207(o)(5) controlled their compensatory leave claims and that *Aiken* was inapplicable. The City did not respond to the Police Officers' objections.

The district court adopted the magistrate judge's recommendation that defendant's compensatory time system be found to comply with § 207(o)(5) , citing *Aiken*. The district court concluded that the "unduly disruptive" language in Section 207(o)(5) is not ambiguous and that the Secretary's opinions on Section 207(o)(5) were neither binding nor persuasive. The district court reasoned, in sum, that requiring the City to pay overtime wages to substitute officers would impose an unreasonable financial burden on the City's ability to provide police services of an acceptable quality and quantity. In the district court's view, such a financial imposition was unduly disruptive and was contrary to the congressional intent underlying the 1985 FLSA amendments establishing compensatory leave, including Section 207(o)(5).

B. *Factual Background*

The City uses compensatory time as an alternative method of paying overtime to its police officers. On April 1, 1995, the City and the Cleveland Police Patrolmen's Association ("CPPA") entered into a Collective Bargaining Agreement ("CBA") allowing overtime to be paid in compensatory time for law enforcement officers whose work exceeds 171 hours within a 28-day period, as permitted by 29 U.S.C. 207(k). The CBA expired on May 31, 1998, but with the parties' agreement, its provisions remain in effect.

Under Article XI, Section 15(m) of the CBA, a Cleveland police officer who is eligible to be compensated for overtime pay can elect on a quarterly basis either compensatory time or cash. For awards of compensatory time, the City awards 90 minutes of compensatory time for each hour of overtime. The City pays cash to those officers who have already accumulated in excess of 480 hours of FLSA compensatory time - the maximum permitted by the FLSA - at time and one-half for all hours worked above that unit. *Id.* Those officers who have not reached the maximum are paid one hour of cash for 30 minutes of overtime. *Id.* Under Article XI, Section 15(c) of the CBA, "the City shall be the sole judge of the necessity for overtime ... There shall be no pyramiding of overtime or other premium pay compensation."

Under Article XI, Sections 15(k) and (j) of the CBA, a police officer may elect to use accrued compensatory time as either "compensatory time off" or as a "family day." According to Article XI, Section (k), leave for compensatory time is subject to two conditions:*Compensatory Time Off. Compensatory time off shall be granted [1] in accordance with operational needs and [2] upon reasonable request by the employee requesting such compensatory time off.* Requests for the use of compensatory time will be considered and granted to the employee who first requested the time off, unless an emergency exists.(emphasis added).

As stated in the CBA, an officer's compensatory leave requests are subject to the City police department's "operational needs." The CBA, however, does not define "operational needs." The commander of human

resources for the City's police department describes "operational needs" as "the minimum numbering of zone and special response cars required for a platoon in a district based on the department review of calls for service, per car per district." Robert Beck, the union's president, disputed this characterization of "operational needs," and stated that "there's no stated minimum" of cars, rather "on a daily basis," "it falls under the bailiwick of the [officer in command] to make a decision that day."

To request compensatory leave time, an officer submits an overtime card or places his or her name on the district's calendar that is maintained for that purpose. Once the district's officer-in-charge is satisfied with the number of officers on duty, compensatory leave is awarded on a first come/first served basis. Yet, police supervisors can deny any request for compensatory time off if a special need exists. As a matter of policy, the City does not allow a substitute officer to earn overtime compensation to work in the place of the officer who requests compensatory leave.

As to the operation of the City's compensatory leave practices, the District Court made the following findings of fact on the amount of compensatory time utilized by the City's police officers:In 1998, 182,651.75 hours of compensatory time, amounting to 22,831 days, were taken by about 1,550 patrol officers of the Cleveland Police Department.

In 1999, this amount increased to 197,412 hours, or about 24,676 days were taken by approximately 1,550 patrol officers.

In 2000, 153,554.75 hours were taken through October 29th, and its estimated that more than 185,000 hours will be used by the end of the year.The average compensatory leave time per police officer was 15.2 days annually. The City, however, did not provide statistics on the total compensatory leave its police officers accumulated, but did not use.

The Police Officers' claim is that the City's compensatory leave policy devalues the Police Officers' accrued compensatory time because the City has denied 85% of the Police Officers' requests for this leave. Of the officers deposed, the district court's findings of fact reflect that Officer Kalocizis's requests for compensatory leave time were denied slightly less than one-third of the time. Over the years, Officer Sabo requested compensatory time 40 or 50 times, and the City granted only ten or 15 of his requests. Officer Kijavskas testified that he was denied "lots of days off." Officer Richmond, however, was denied the use of his compensatory time only twice in the last three years. While working as a patrol officer, Officer Vukovic had his compensatory time requests denied 50% to 60% of the time. Officer Van Verth was denied compensatory time ten times, but was granted approximately 100 hours for the first ten months of 2000. Officer Beckwith has had his requests for compensatory time denied seven or eight times a year. *Id.* Officer Sudy testified that when she worked on the first platoon in the Fourth District, "nobody got comp time on day shift in the Fourth District for months and months and months at a time. I gave up even requesting it." The City notes that according to its records, Sudy, in fact, consistently requested and received compensatory time leave averaging 124.6 hours per year over a three-year

period.

C. *Standard of Review*

This Court reviews de novo a district court's grant of summary judgment. City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 250 (6th Cir. 1994). Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate only "if ... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). For such a motion, the Court views the evidence in the light most favorable to the non-moving party. *See* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). For cross-motions for summary judgment, we "must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the non-moving party." Wiley v. United States, 20 F.3d 222, 224 (6th Cir. 1994). The filing of cross-motions for summary judgment does not necessarily mean that an award of summary judgment is appropriate. B.F. Goodrich Co. v. United States Filter Corp., 245 F.3d 587, 593 (6th Cir. 2001).

D. *Analysis*

The controlling issue here is whether, upon the proof presented, the City's denial of its police officers' timely requests for use of their accrued compensatory leave, to avoid payment of substitute officers at overtime rates, is appropriate under Section 207(o)(5)'s undue

disruption rule. The threshold issue, however, involves the legal effect of the Secretary's opinions that a city's denial of a legitimate compensatory leave request to avoid overtime compensation to a substitute officer does not qualify as an undue disruption with the meaning of Section 207(o)(5).

Section 207(o) of the FLSA was enacted in 1985 as part of congressional amendments to address the financial hardships that the FLSA imposed upon states and their political subdivisions. Christensen v. Harris County, 529 U.S. 576, 578, 146 L. Ed. 2d 621, 120 S. Ct. 1655 (2000). The principal statutory accommodation was to authorize states and their political subdivisions to award compensatory time or leave "in lieu of overtime compensation." 29 U.S.C. § 207(o)(1) (2003). Section 207(o)(5) mandates a governmental entity to grant compensatory leave subject to two conditions:(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency-

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) *who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time[1] within a reasonable period after making the request [2]if the use of the compensatory time does not unduly disrupt the operation of the public agency.*29 U.S.C. § 207(o)(5) (2003) (emphasis added).

In *Christensen,* the Supreme Court considered a county's policy requiring its employees to use their accrued compensatory leave so as to avoid paying its

officers compensation for unused leave. The Supreme Court interpreted Section 207(o)(5) and concluded that: "At bottom, we think the better reading of § 207(o)(5) is that it imposes a restriction upon an employer's efforts to *prohibit* the use of compensatory time when the employees request to do so; that provision says nothing about restricting an employer's efforts to require employees to use their compensatory time." 529 U.S. at 585 (emphasis in original).

Under the FLSA, the Secretary possesses the authority to issue rules and regulations to implement the Act. 29 U.S.C. §§ 202, 203. As to section 207(o)(5), the Secretary promulgated 29 C.F.R. § 553.25, which defines the "unduly disrupt" phrase as follows:(d) Unduly disrupt. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) *For an agency to turn down a request from an employee for compensatory time off requires* that it should reasonably and in good faith anticipate *that it would impose an unreasonable burden on the agency's ability to provide services* [*16] *of acceptable quality and quantity for the public* during the time requested without the use of the employee's services.29 C.F.R. 553.25(d) (emphasis added).

The Secretary's preamble to this regulation states: "The Department recognizes that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time. However, such a situation, in and of itself, would not be

sufficient for the employer to claim that it is unduly disruptive." 52 Fed. Reg. 2012, 2017 (1987). In an August 19, 1994, opinion letter, the DOL's Wage and Hour Administrator similarly opined that:

It is our position, notwithstanding [a collective bargaining agreement to the contrary], that an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide service of acceptable quality and quantity for the public during the time requested without the use of the employee's services. *The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive.* (Emphasis added).

1994 WL 1004861 (emphasis added).

In a FLSA action involving similar claims as here, Debraska v. City of Milwaukee, 131 F. Supp. 2d 1032 (E.D. Wis. 2000), the district court relied on the Secretary's amicus brief, which interpreted the definition of "unduly disrupt" under Section 207(o)(5):

The City claims undue disruption of its operations by granting the use of accrued comp time without having tried various operational alternatives, such as calling replacement officers from other shifts or from other divisions. This could be done without overtime hours being worked. In some cases, however, there may be no alternative to requiring an officer to work overtime hours so that another officer may utilize accrued comp

time, *but the Secretary reasonably has determined consistent with legislative intent, that having to work overtime does not, by itself, amount to such a disruption.* Indeed, this is particularly true where the City could pay the replacement officers in comp time and not cash overtime wages. *Congress recognized that only operational disruption, not payroll expense to the employer, could be a basis for denying an employee the use of accrued comp time.*

Id. at 1036 (emphasis added).

Where Congress grants "an express delegation of authority to the agency to elucidate a specific provision of the statute to the agency by regulation [,] [the agency's] legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron USA., Inc. v. Nat'l Res. Def. Council, Inc, 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). As for "interpretations such as those in opinion letters ... policy statements, agency manuals, and enforcement guidelines," the Supreme Court subsequently held in *Christensen* that they "do not warrant *Chevron*-style deference." 529 U.S. at 587. But the *Christensen* Court did acknowledge one circumstances in which such agency interpretations would be entitled to deference - "when the language of the regulation is ambiguous." Id. at 588. *See also* Auer v. Robbins, 519 U.S. 452, 462, 137 L. Ed. 2d 79, 117 S. Ct. 905 (1997) (holding that the Secretary's interpretation of his own regulation is "controlling unless plainly erroneous or inconsistent with the regulation"); United States v. Cinemark USA, Inc., 348 F.3d 569, 578 (6th Cir. 2003) ("When an agency is interpreting its won regulations, even greater

deference is due to the agency's interpretation."). Recently, the Supreme Court reemphasized that agency opinions can be given "deference whatever its form, given the [agency's] specialized experience and broader investigations and information." United States v. Mead, 533 U.S. 218, 234, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001) (quoting Skidmore v. Swift, 323 U.S. 134, 139, 89 L. Ed. 124, 65 S. Ct. 161 (1944)).

In rejecting the Secretary's opinion as to what satisfies the "unduly disrupt" standard, the district court first concluded that "the regulation [29 CFR § 553.25] ... is not ambiguous." The district court also found the Secretary's position "unreasonable" given the purpose of § 207(o) "to ameliorate the burdens associated with necessary changes in employment practices" that the FLSA imposed on public employers. (Citing Moreau v. Klevenhagen, 508 U.S. 22, 26, 123 L. Ed. 2d 584, 113 S. Ct. 1905 (1993).) In its opinion, the district court adopted the City's argument:

Defendant persuasively argues that, if public employees knew that they would be required to pay overtime to substitute officers in order to accommodate each and every compensatory time request, the savings purpose of § 207(o) would be defeated and no employer would enter into a compensatory time agreement. If plaintiffs are correct, the granting of compensatory time in lieu of cash compensation becomes merely a method for the creation of additional overtime. It would be less expensive for defendant to pay all overtime in cash in the first place than to pay it in compensatory time and then have to pay overtime compensation to substitute officers when that compensatory time is used. The Department of Labor's interpretation of §

207(o) defeats the whole purpose of compensatory time. Thus, this Court does not find it has the power to persuade.(J.A. at 195).

We respectfully disagree with the district court's conclusions for several reasons. First, the phrase "unduly disrupt" is inherently ambiguous because to give this phrase meaning requires a specific factual scenario that can give rise to two or more different meanings of this phrase. The existence of the Secretary's regulation, opinion letters, and amicus brief on the meaning of "unduly disrupt" in Section 207(o)(5) reflects the Secretary's recognition that the phrase is ambiguous and needs interpretation to ascertain its meaning. As discussed below, the judicial decisions that differ on the proper interpretation of Section 207(o)(5) also reflect this ambiguity.

Under *Chevron*, when a statute is ambiguous and Congress grants rulemaking authority, as here, the courts should defer to the Secretary's interpretations of "unduly disrupt," especially where, as here, the regulation and its interpretation have been consistently applied since 1987. Under Christensen and Mead, we conclude that the Secretary's opinion letter must be given deference and that the Secretary's *amicus* brief be accepted as persuasive authority.

Second, other provisions of the 1985 FLSA amendments and the legislative history of those amendments reveal that interference with government operations, not budgets, was the primary purpose of the "unduly disrupt" standard in Section 207(o)(5). To be sure, the 1985 FLSA amendments were designed to provide state and local governmental entities some

financial relief from compliance with the FLSA. Moreau, 508 U.S. at 26. Congress's clear choice for this accommodation was compensatory time to be awarded "in lieu of overtime compensation." Congress, however, did not intend to relieve these governmental entities of all financial costs of overtime, as reflected in Section 207(o)(3)(A) that limits compensatory time to 480 hours and requires any excess to be paid in cash.

Moreover, the legislative history of Section 207(o)(5) reflects that the phrase "unduly disrupt" did not apply to financial impact on public employers' payrolls. The House of Representatives's Report reflects its intention that public employees should be able to enjoy the use of their accumulated compensatory time and that compensatory time should not be used to avoid overtime pay:The Committee is very concerned that public employees in office with regular year-round functions, short staff, and steady demands will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time. *It is the committee's view that an employee should not be coerced to accept more compensatory time in lieu of overtime pay in a year than an employer realistically and in good faith expects to be able to grant to that employee if he or she requests it within a similar period. To do otherwise would permit public employers to enjoy the fruits of the overtime labor of employees without having to pay the overtime premium required by the Act. Clearly, compensatory time is not envisioned as a means to avoid overtime compensation.* It is merely an alternative method of meeting that obligation. House Report No. 99-331, 99th Cong. 1st Sess. 23 (1985) (emphasis added).

The Senate Report on the 1985 FLSA amendments provides an example of what "unduly disrupt" in section 207(o)(5) means:

The employee also has the right to use some or all of his accrued comp time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operation. Use of the term 'reasonable' is intended to accommodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request for the use of comp time, that request should be honored unless to do so would be unduly disruptive. *By 'unduly disruptive,' the committee means something more than mere inconvenience. For example, a request by a snow plow operator in Maine to use 40 hours of comp time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June would not be unduly disruptive.*SR. 99-159, 1985 U.S.C.N. 651, 660 (emphasis added).

From this legislative history n3 of Section 207(o)(5), we conclude that its "unduly disruptive" limitation was intended to apply to actual governmental operations, not the fiscal impact of compensatory leave.

The Secretary's opinions on the "unduly disruptive" provision in Section 207(o)(5) are consistent with the legislative reports that compensatory time should not be used to avoid overtime pay and that "unduly disrupt" applies to governmental operations, not finances. Thus, the Secretary's opinion that the mere payment of overtime to honor a request for compensatory leave

does not qualify as "unduly disruptive" is wholly consistent with Section 207(o)(5) and its legislative history. The Secretary's opinion is also consistent with Supreme Court precedent that FLSA's overtime provisions were intended to create the incentive to hire more workers, not to overwork the existing workforce. As the Supreme Court observed about the overtime provisions of the FLSA: "Section 7(a) achieves its dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long workweek." Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 423-24, 89 L. Ed. 1705, 65 S. Ct. 1242 (1945). Here, the City appears to be utilizing the FLSA to avoid payment of overtime and to avoid adding personnel to meet its actual operational needs. Thus, the district court erred in failing to defer to the Secretary's opinion on the meaning of "unduly disrupt" in Section 207(o)(5).

District courts in other circuits have deferred to the Secretary's interpretation of "undue disruption," holding that the requesting employee must be granted compensatory time even if to do so means that the replacement officer must be paid overtime. Debraska, 131 F. Supp. 2d. at 1037; Canney v. Town of Brookline, 142 Lab. Cas. P 34,169 (D.Mass. 2000); Long Beach Police Officers' Ass'n v. Luman, 2001 U.S. Dist. LEXIS 25354, 8 Wage & Hour Cas. 2d (BNA) 1395 (C.D.Cal. 2001).

Third, the district court also erred in its interpretation and reliance upon *Aiken* which addressed the "reasonable request" clause in Section 207(o)(5). *Aiken* also relied upon the language of the CBA that defined

"the conditions under which an employee can take compensatory time off." As stated in *Aiken*:

Plaintiffs contend that the payment of overtime to an officer so that another can use banked compensatory time is not an undue disruption.

* * *

The fundamental defect in the plaintiffs' position, however, is that it completely ignores the phrase "reasonable period," which the Act gives the parties the freedom to define.

* * *

In this case, the city and the plaintiffs' union had an agreement on the issue of compensatory time. The agreement provided "the conditions under which an employee can take compensatory time off." 29 C.F.R. § 553.25. These include a condition that once a certain number of officers requested a specific day off, the commanding officer may close the precinct's log book for that day. *The city and the union in this case have agreed, then, that the reasonable period for requesting the use of banked compensatory time begins thirty days prior to the date in question and ends when the number of officers requesting the use of compensatory time on the given date would bring the precinct's staffing levels to the minimum level necessary for efficient operation. We are loath to interfere with this agreement.* Therefore, we conclude that the district court did not err by finding for the city on this claim.

Id. at 756-57. (emphasis added).

Aiken's holding involved only the "reasonable request" provisions in Section 207(o)(5) and 29 C.F.R. § 553.25. As the dissent in *Aiken* noted: "Neither the district court nor the majority here come squarely to grips with the plaintiffs' claim that they are, on some occasions, being denied compensatory time off for reasons forbidden under the [FLSA] and its implementing regulations." 190 F.3d at 762 (Ryan, J., dissenting); accord. Debraska, 131 F. Supp. 2d at 1036-37. In contrast, this action centers on the "unduly disrupt" clause in Section 207(o)(5), as the district court concluded in a footnote:

Although the parties mention the "reasonable period" provision of § 207(o), there is no genuine dispute as to whether requests to use compensatory time are granted within a reasonable period. Rather, the real dispute concerns defendant's policy of granting compensatory time only up to the point where the minimum car plan is full and refusing to allow officers who would be compensated at the overtime rate to substitute for the officer requesting the use of compensatory time.(JA at 190 n.14).

Thus, we conclude that Aiken is not controlling here especially in light of Christensen, which was decided after *Aiken*. *Christensen* concluded that, unless authorized by its provisions, § 207(o)(5) prohibits the denial of compensatory leave. In *Christensen*, the Supreme Court stated that " § 207 (o)(5) is more properly read as a minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it. As such, the proper *expressio unius* inference is that an employer may not, at least in the absence of an agreement, deny an

employee's request to use compensatory time for a reason other than that provided in § 207(o)(5)." 529 U.S. at 583. We are dealing here with a distinct statutory right under the FLSA that is not modified by a CBA.

Fourth, as a factual matter, although the CBA allows the City to determine the overtime hours and police department's "operational needs," the actual basis for the City's denials of the officers' compensatory leave requests is not a lack of staffing, but financial considerations. Financial impact is not set forth in the CBA as a basis for the City to deny police officers' compensatory leave requests. Moreover, the CBA does not define "operational needs" and Beck's testimony about the *ad hoc* system of administering the staffing policy creates a material factual dispute about the City's reliance on its car plan to justify its denials of compensatory leave. Absent an express agreement that financial considerations can be used to deny compensatory leave, we conclude that the Secretary's interpretation of Section 207(o)(5) should control.

Without express language in the CBA authorizing the use of financial impact to deny requests for compensatory leave, we are also reluctant to infer a waiver of these employees' statutory rights. *Christensen* interpreted Section 207 (o)(5) as prohibiting the denial of compensatory leave absent the presence of a statutory condition. 529 U.S. at 583. In the labor context, including decisions under the FLSA, the Supreme Court has not allowed labor agreements to defeat an employee's statutory rights:

While courts should defer to an arbitral decision where the employee's claim is based on the rights arising out

of the collective-bargaining agreement, different consideration apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

***

This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate.

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 737, 740, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981).

Moreover, courts interpreting the "unduly disrupt" standard consider proof of the effects of the compensatory leave requests upon actual police operations. In Houston Police Officers' Union, et al. v. City of Houston, 330 F.3d 298 (5th Cir. 2003), *cert. denied* 540 U.S. 879, 157 L. Ed. 2d 143, 124 S. Ct. 300 (2003), the Fifth Circuit rejected the police officers' argument that, under Section 207(o)(5), compensatory leave must be made available upon an officer's request. There, the City of Houston required a police officer who desired to use his/her accrued compensatory time to sign his/her name in a "Red book" kept by each unit for that purpose. Id. at 300 Each unit had a limit on the number of officers who could be off on a given day, that,

in effect, was 10% of the officers in the unit. Id. at 301. If the limit had been reached when an officer requested the leave, the officer was denied leave for that day. The Fifth Circuit first "concluded that [Section 207(o)(5)] does not require a public employer to authorize comp-time use as specifically requested by an employee (subject to the undue disruption clause), but instead requires that the comp time be permitted within a reasonable time after the employee requests its use." Id. at 304

In *Houston*, the city's denial of an officer's leave request "was based upon the shift's commander's estimate of the unit's manpower needs. The primary considerations in formulating this estimate were the unit's anticipated workload (based on historical trends), the unit's efficiency, and the unit's ability to tolerate disruption in its operations." Id. at 300-01. The Fifth Circuit found that the city's system did not violate § 207(o)(5) of the FLSA, based upon expert proof about the effects of the City's actual operation of its compensatory leave policy:

We also note, moreover, that [the undue disruption] exception would be void of legal significance even if the Union's reading of the FLSA were correct. This is so because requiring comp-time usage-on-demand would, as *Dr. Jeanneret's uncontroverted analysis* concludes, "unduly disrupt" the operations of the HPD. As he said:

Such understaffing would severely impact the operational efficiency and effectiveness of HPD and undermine the Department's continued efforts to provide the required levels of service within the budget allocations provided in the City of Houston.

In other words, local neighborhoods could be seriously adversely affected when too many regular duty officers are off work. The FLSA requires, generally, that officers be allowed to take comp time within reasonable periods after making their requests. *The burden that this statute places upon public employers is waived, however, in those circumstance where compliance would "unduly disrupt the operations of the public agency.*" This balance represents the statutory compromise between the interests of public agencies and their employees. *Without adequate evidence placing Dr. Jeanneret's conclusion of undue disruption into dispute, this court must conclude, as did the district court, that the Union has no claim cognizable under* section 207(o)(5).

Id. at 306-07 (emphasis added).

Here, the factual record tends to establish that the City's principal and motivating consideration for the denials of the Police Officers' compensatory leave requests was solely financial, i.e., the payment of overtime to substitute officers. Thus, *Houston* is factually inapposite because the "primary considerations" for the denial of compensatory leave in *Houston* were the consequences on the unit's operations and ability to serve the city's and unit's needs. As reflected in the district court's findings of fact, this record reveals that the controlling factor here is the financial consequences of granting the Police Officers' otherwise timely requests for compensatory leave.

The City also relies upon the recent Ninth Circuit

decision in Mortensen v. County of Sacramento, 368 F.3d 1082 (9th Cir. 2004). *Mortensen*, holds that "the text of § 207(o)(5) unambiguously states that once an employee requests the use of CTO [compensatory time off], the employer has a reasonable period of time to grant the request [and] that the county's implementation of its leave policy, which may result in denying a specific request when there are no available leave openings and the parties' Agreement regarding [compensatory time off] use are consistent with § 207(o)(5)." 368 F.3d at 1084.

As we noted earlier about *Aiken*, *Mortensen*'s holding involves primarily the reasonable-period-of-time clause in Section 207(o)(5) for granting compensatory leave request. This clause is not as issue in this appeal. In addition, Mortensen is distinguishable as it concerns a denial of a single police officer's request for leave. Here, the issue is the City's systemic denial of police officers' accrued compensatory leave based upon the undue disruption clause in Section 207(o)(5).

To be sure, *Mortensen* comments that an officer cannot "force the county to pay another deputy overtime so that he could use his CTO [compensatory time off]" because "then the purpose of § 207(o) would be eviscerated. This requirement would burden the county considerably by increasing the overtime that it must pay to employees. If implemented, [the officer's] proposed construction would remove the flexibility and control from the county that is clearly contemplated by the FLSA." 368 F.3d at 1090.

To the latter conclusion, we respectfully disagree for several reasons. First, to grant the City the unlimited

discretion to deny compensatory leave requests relieves the City of establishing the undue disruption requirement imposed by Congress. Second, the undue disruption clause is ambiguous and the Secretary's regulations that a City cannot deny compensatory leave merely to avoid payment of overtime to a substitute officer should obtain here. To comply with the Act and its legislative history, the City should be required to make a factual showing of undue disruption, financial or otherwise. The City possesses the facts necessary to prove the alleged undue disruption. We therefore decline to adopt a wholesale deference rule that would allow the City to adopt a compensatory leave policy that deprives the officers of the enjoyment of their accrued leave that Congress awarded and intended public employees to enjoy. Such an unlimited rule of deference defeats the purposes of the Act, as reflected in its legislative history and the Secretary's regulations as well as relevant Supreme Court precedent by allowing the City to overwork its existing police officers when circumstances require the hiring of new officers. *See supra* at pp.14-15.

We find more persuasive those district court decisions that apply the Secretary's regulations and opinions on Section 207(o)(5). In Debraska, the police officers sued the city of Milwaukee for violating the FLSA by turning down their compensatory time requests when granting leave would require the city to pay replacement officers overtime or to call other officers as replacements from other shifts. The city argued that its policy did not violate the FLSA because the city always granted compensatory time within one week of the requested date, which it contended is a "reasonable period" under the statute. 131 F. Supp. 2d at 1034. The

district court disagreed and found that the phrase "reasonable period" in section 207(o)(5) was ambiguous and deferred to the DOL's interpretation of Section 207(o)(5). Id. at 1034-36. As to the "unduly disrupt" rule, the district court stated:

I note, however, that the Secretary has opined in the sources quoted above that the mere fact that a comp time request might require another officer to work overtime does not, by itself, cause undue disruption. It is possible that adopting the measures proposed by the plaintiffs would in some cases or perhaps many cases impose an unreasonable burden, depending on the circumstances. The determination of that issue will have to await further proceedings.

Id. at 1037.

In *Canney*, the question involved the police department's system to deny an officer's leave request for a particular day as accrued compensatory time where to do so required the city to pay another officer at an overtime rate. The district court held that the payment of overtime to substitute officers did not constitute an undue disruption, but added that: "On the present record nothing indicates that having to pay one or more officers overtime in cash, to permit another officer to take compensatory time would effect the police department's 'ability to provide services of acceptable quality and quantity.'" 142 Lab. Cas. at 52,449.

Debraska and Canney suggest that to rely upon the financial impact of paying overtime to substitute officers to justify denial of compensatory leave under

Section 207(o)(5), the public employer must present clear proof of disruption of services. This record, however, does not allow us to reach a conclusion on whether the financial impact on the City from granting the Police Officers' timely requests for compensatory leave would establish "undue disruption" of police services within the meaning of Section 207(o)(5). The City did not present any proof of the financial impact on the police department's budget from the Police Officers' timely leave request. The City did not offer any proof as to how that sum impacted the City's finances. The district court inferred an adverse financial impact upon the City based solely on the amount of the Police Officers' accumulated leave. The City did not present any proof on the total amount of compensatory leave denied Police Officers under its policy, a factor that if high enough would defeat the congressional purpose in establishing compensatory leave for public employees. Nor is there expert proof that the City's operational needs would be unduly disrupted by granting the Police Officers' leave requests. Based upon the testimony of the union's president, there is a material factual dispute on whether the City's car unit plan is the actual basis for determining a police unit's operational needs.

In our view, invalidation of the Police Officers' statutory rights under Section 207(o)(5) requires a clear showing of the City's entitlement to the undue disruption exception to awards of accumulated compensatory leave. The Police Officers' compensatory leave requests must be granted absent "clear and affirmative evidence" n4 of an undue disruption of the City's provision of police services for its citizens that is the controlling consideration under the "unduly disrupt" standard in Section 207(o)(5).

For these reasons, we REVERSE the district court's judgment and REMAND the case for further proceedings on the purpose and effect of the City's administration of its compensatory leave for police officers.

- ---------- Footnotes ----------

* The Honorable William J. Haynes, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

n1 The Complaint was originally filed by thirty-five individual plaintiffs. On December 17, 1999, and June 6, 2000, the district court granted plaintiffs' unopposed motion to add 1,356 police officers who consented to join the action.

n2 As discussed *infra*, in *Aiken*, we deferred to the collective bargaining agreement between the police union and the city that specifically defined "the conditions under which an employee can take compensatory time off." 190 F.3d at 755 (quoting 29 C.F.R. § 553.25). *Aiken*, however, addressed only the reasonable request provision in Section 207(o)(5), not its "undue disruption" clause that is at issue here. *See* 190 F.3d at 762-64 (Ryan, J., dissenting).

n3 The City cites eloquent statements of individual members of Congress in support of its interpretation of FLSA. "Ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." Chrysler Corp. v. Brown, 441 U.S. 281, 311, 60 L. Ed. 2d 208, 99

S. Ct. 1705 (1979). The Supreme Court considers legislative reports mores persuasive. "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bills, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation'." Garcia v. United States 469 U.S. 70, 76, 83 L. Ed. 2d 472, 105 S. Ct. 479 (1984) (quoting Zuber v. Allen, 396 U.S. 168, 186, 24 L. Ed. 2d 345, 90 S. Ct. 314 (1969)).

n4 The "unduly disrupt" provision is in the nature of an exception from an award of FLSA compensatory leave benefits. In such instances, we have required that "the [employer] must establish through 'clear and affirmative evidence' ... every requirement of the exemption. The exemptions are to be narrowly construed." Ale v. TVA, 269 F.3d 680, 691, n.4 (6th Cir. 2001)(quoting Roney v. United States, 790 F. Supp. 23, 26 (D.D.C. 1992), and citing Arnold v. Ben Kanowsky Inc., 361 U.S. 388, 392, 4 L. Ed. 2d 393, 80 S. Ct. 453 (1960), and Douglas v. Argo-Tech Corp, 113 F.3d 67, 70 (6th Cir. 1997)).

No. 1:99 CV 1271
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Robert Beck, et al.,
Plaintiffs

v.

Cleveland Police Department, et al.
Defendants

MEMORANDUM OF OPINION AND ORDER

6/19/01

INTRODUCTION

This matter is before the Court upon the Report and Recommendation of Magistrate Judge Jack B. Streepy (Doc. 53). This cases arises out of plaintiffs' employment with defendants and alleges violation of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (hereafter "FLSA"). Magistrate Judge Streepy recommends that both parties' motions for summary judgment be granted in part and denied in part. Plaintiffs have raised four objections to the Report and Recommendation, arguing that the magistrate judge erred in concluding that (1) the officer questionnaires submitted by plaintiffs pursuant to Federal Rule of Evidence 1006 should be stricken; (2) ten minutes is an appropriate standard for determining whether pre- and post-shift work is noncompensable under the de minimis doctrine; (3) defendant City of Cleveland is entitled to the partial overtime compensation

exemption set forth in 29 U.S.C. § 207(k) (hereafter "§ 207(k)"); and (4) defendant City of Cleveland complies with 29 U.S.C. § 207(o) (hereafter "§ 207(o)") with regard to the allowed use of accrued compensatory time. For the following reasons, the Report and Recommendation is ACCEPTED IN PART and REJECTED IN PART.

FACTS

Plaintiffs are several hundred current and former Cleveland police officers.fn1 (Compl. ¶1). Defendants are the Cleveland Police Department and the City of Cleveland. (Compl. ¶8-9). Defendant Cleveland Police Department is divided into three major divisions: Field Operations, Special Operations and Administrative Operations. (Hennessy Depo.14). Basic patrol operations are conducted by patrol officers in the six neighborhood districts as a part of Field Operations. (Hennessy Depo.14-15). Each district is patrolled by four platoons. (Hennessy Depo. 20). The first platoon begins its shift at 6:30 a.m. or 7:30 a.m., the second platoon at 2:30 p.m. or 3:30 p.m. and the third platoon at 10:30 p.m. or 11:30 p.m. (Hennessy Depo. 20). The fourth platoon begins its shift at 7: 00 p.m. or 8:00 p.m. and overlaps the day's busiest hours. (Hennessy Depo. 20). Each shift is eight hours long. (Hennessy Depo. 20). The number of shifts per platoon and the start time of the shifts varies depending on the time of year and need. (Hennessy Depo. 21).

Eleven officers were selected by the parties as representative of plaintiffs' claims. These officers include Robert Beck, Paul Beckwith, Sean Gorman, Ray Kaloczi, Jr., Simas Kijauskas, Michael Richmond,

David Sabo, Margaret Sudy, John Thomas, William Van Verth and George Vukovic. (Facts ¶ 2).fn2 In addition, defendant City of Cleveland selected two designees to be deposed pursuant to Federal Rule of Civil Procedure 30(b)(6): Timothy Hennessy, Commander of the Bureau of Human Resources, and Sergeant James Alan Rubino, (Hennessy Depo. 4-5; Rubino Depo. 4-5).

From April 1, 1995 through March 31, 1998, the parties were subject to the provisions of a collective bargaining agreement (hereafter "CBA"). (Beck Depo. 5-7). Despite the expiration of this CBA in 1998, the parties entered into an agreement that compensation provisions relevant to this case would remain the same. (Beck Depo. 5-7).

The officers' annual salaries are set forth in the CBA according to position. (CBA Art. XXVI, § 51). Officers are paid their annual salary 26 times a year at 80 hours per pay period. (CBA Art. XI, § 15(a)). A shift differential is paid to officers working on the second, third and fourth platoons. (CBA Art. XXVI, § 54). The shift differential is $0.35 per hour for second and third platoon officers and $0.47 cents per hour for fourth platoon officers. (CBA Art. XXVI, § 54). In addition, officers receive longevity pay based upon years of service. (CBA Art. XVI, § 31). According to the CBA, an officer's hourly rate for the purpose of calculating overtime and other premium compensation is computed by dividing his or her annual salary by 2080 hours. (CBA Art. XI, § 15(c)).

Two separate work schedules are maintained for Cleveland police officers. (Beck Depo.10-1 l; CBA Art. XI, § 15(m)). Most basic patrol officers have an eight-

day work period comprised of three cycles of six days on and two days off followed by two cycles of five days on and three days off. (Beck Depo. I I-12). These officers receive overtime compensation for all hours worked in excess of 48 in a given work period. (Beck Depo. 8-9). Other officers have a seven-day work period comprised of five days on and two days off. (Beck Depo. 4-5,11-12). These officers receive overtime compensation for all hours worked in excess of 40 in a given work period. (Beck Depo. 4-5; CBA Art. XI, § 15(c)). In addition, all officers receive overtime compensation for all hours worked in excess of eight per day. (Hennessy Aff. ¶14)

If an officer is required to continue working after the end of his or her normal shift in order to make a court appearance, review a matter with a prosecutor or engage in another court-related matter, the officer is paid overtime compensation for the actual time worked. (CBA Art. XI, § 15(g)). However, an officer required to engage in any of these activities at a time not contiguous to his or her scheduled work time receives a minimum of three hours overtime compensation. (CBA Art. XI, § 15(g)). A third platoon officer receives a minimum of four hours overtime compensation if he or she works the same day. (CBA Art. XI, § 15(g)). Thus, officers are generally paid for significantly more court time than they actually spend in court, since they are compensated according to the CBA even when an hour or less of their time is consumed. (Rubino Aff. ¶17).

Overtime compensation is paid either in compensatory time or in cash. (CBA Art. XI, § 15(m)). If an officer chooses to be paid in compensatory time, he or she receives 90 minutes of compensatory time for each

overtime hour worked. (CBA Art. XI, § 15(m)). An officer may accumulate up to 480 hours in his or her FLSA compensatory time bank. (CBA Art. XI, § 15(m)). If an officer chooses to be paid in cash, he or she is paid one hour in cash and 30 minutes is added to his or her compensatory time bank. (CBA Art. XI, § 15(m)). Once the compensatory time bank threshold is reached, the officer is paid entirely in cash. (CBA Art. XI, § 15(m)).

Under the CBA, compensatory time can be taken in the form of a "Family Day":

Family Day. Employees may request a day off for graduation, wedding or religious ceremony or similar family event, and will give five (5) days written notice of said request to the Department. Such day off shall be granted unless a conflict exists with the emergency operational needs of the Department and employees shall use their accumulated compensatory time for the day off.

(CBA Art. XI, § 15(k)).

Ordinary compensatory time can also be used according to the following method:

Compensatory Time Off. Compensatory time off shall be granted in accordance with operational needs and upon reasonable request by the employee requesting such compensatory time off. Requests for the use of accumulated compensatory time will be considered and granted to the employee who first requested the time off, unless an emergency exists.

(CBA Art. XI, § 15(j)). Operational needs are determined by a "car plan," which designates the minimum number of zone and special response cars required per platoon per district based on a review of calls for service. (Hennessy Aff. ¶110).

An officer desiring to request the use of compensatory time submits an overtime card or lists his or her name on a district calendar kept for that purpose. (Hennessy Depo. 53; Sabo Depo.19). Once the district officer-in-charge is assured that the minimum car plan is filled, officers are granted compensatory time off on a first come/first served basis. (Hennessy Aff. ¶¶ 9,11). However, supervisors can deny a request for compensatory time off even if a car plan is filled when a special need exists. (Rubino Depo. 24-25). Specialized units such as homicide, SWAT and Ports and Harbors maintain their own minimum staffing levels. (Hennessy Aff. ¶12). Once those minimum staffing levels are satisfied, compensatory time off is granted on a first come/first served basis. (Hennessy Aff. 112). There is no policy to allow a substitute officer to earn overtime compensation to work in the place of a requesting officer. (Hennessy Depo. 57; Beck Depo. 27-28).

Officers must attend a roll call at the beginning of each shift. (Hennessy Depo. 22). The length of the roll call depends on how many announcements need to be made. (Hennessy Depo. 22). Defendant requires officers to appear at roll call "ready to roll." (Hennessy Aff. ¶ 3). Thus, an officer must appear at the beginning of his or her shift fully dressed and in possession of a firearm and radio. (Hennessy Aff. ¶3). The purpose of the ready to roll requirement is so that if there is a call to service immediately after roll call, officers will be able to

respond. (Thomas Depo. 67). No officers are required by defendant to perform any service either before roll call or after the end of a shift. (Hennessy Aff.¶3). No officer has ever been disciplined or admonished for not performing work before or after a shift. (Hennessy Aff. ¶21).

The representative officers testified as follows regarding their pre- and post-shift activities:

Officer Kaloczi begins work at 3:30 p.m. (Kaloczi Depo. 25). He tries to get to work by 3:20 p.m. in order to put on his uniform and body armor. (Kaloczi Depo. 26). If the phone rings before the beginning of his shift, he will answer it. (Kaloczi Depo. 27). He arrives back at the station at 11:30 p.m. and leaves immediately after changing back into his civilian clothes. (Kaloczi Depo. 27-28). Approximately once a week, Officer Kaloczi spends a couple minutes before or after his shift conferring with other officers about work-related matters. (Kaloczi Depo. 29).

Officer Sabo arrives at work 30 minutes early every day. (Sabo Depo. 23). He spends that time getting dressed, checking out his radio and the keys to his zone car and talking to other officers to "see what's going on in the city." (Sabo Depo. 23). Officer Sabo will answer the telephone if officers from the previous shift are busy. (Sabo Depo. 24). Three or four times a month, at the end of his shift, he waits for an available telephone to make work-related calls, which takes approximately ten to 15 minutes. (Sabo Depo. 28).

Prior to transferring to the Ports and Harbors Unit, Officer Gorman would arrive at work 30 minutes early

to get dressed and talk to other officers about work-related matters for a few minutes. (Gorman Depo. 33-35). Approximately once a week, he would remain until the end of the next shift's roll call to speak with an incoming officer. (Gorman Depo. 40-41). Officer Gorman also testified that it is much less stressful working at Ports and Harbors, and there are no officers to confer with at the end of his shift. (Gorman Depo. 36-41).

Officer Kijauskas usually arrives 20 minutes before the beginning of his shift and gets

The representative officers testified as follows regarding their pre- and post-shift activities:

Officer Kaloczi begins work at 3:30 p.m. (Kaloczi Depo. 25). He tries to get to work by 3:20 p.m. in order to put on his uniform and body armor. (Kaloczi Depo. 26). If the phone rings before the beginning of his shift, he will answer it. (Kaloczi Depo. 27). He arrives back at the station at 11:30 p.m. and leaves immediately after changing back into his civilian clothes. (Kaloczi Depo. 27-28). Approximately once a week, Officer Kaloczi spends a couple minutes before or after his shift conferring with other officers about work-related matters. (Kaloczi Depo. 29).

Officer Sabo arrives at work 30 minutes early every day. (Sabo Depo. 23). He spends that time getting dressed, checking out his radio and the keys to his zone car and talking to other officers to "see what's going on in the city." (Sabo Depo. 23). Officer Sabo will answer the telephone if officers from the previous shift are busy. (Sabo Depo. 24). Three or four times a month, at the end of his shift, he waits for an available telephone

to make work-related calls, which takes approximately ten to 15 minutes. (Sabo Depo. 28).

Prior to transferring to the Ports and Harbors Unit, Officer Gorman would arrive at work 3 0 minutes early to get dressed and talk to other officers about work-related matters for a few minutes. (Gorman Depo. 33-35). Approximately once a week, he would remain until the end of the next shift's roll call to speak with an incoming officer. (Gorman Depo. 40-41). Officer Gorman also testified that it is much less stressful working at Ports and Harbors, and there are no officers to confer with at the end of his shift. (Gorman Depo. 36-41).

Officer Kijauskas usually arrives 20 minutes before the beginning of his shift and gets dressed. (Kijauskas Depo. 20-21). However, he testified that, depending on traffic, sometimes officers are not dressed for roll call, which is not a problem as long as they get dressed as soon as possible. (Kijauskas Depo. 22). He also picks up his messages and makes telephone calls. (Kijauskas Depo. 21-22, 24-26). On a daily basis, Officer Kijauskas stays after the end of his shift to pass along information to incoming officers. (Kijauskas Depo. 28-29). Officer Kijauskas testified that if he works beyond the end of his shift for only 15 or 20 minutes, he does not request overtime compensation. (Kijauskas Depo. 9). However, he will do so if he works more than 3 0 extra minutes. (Kijauskas Depo. 8-9).

Officer Richmond, who is a detective in the Auto Theft Unit, always includes work performed prior to or after his shift on his duty report. (Richmond Depo. 5,17). There is no roll call for the Auto Theft Unit. (Richmond Depo.16). Approximately once a month, Officer

Richmond answers the telephone outside his regular shift. (Richmond Depo.18-19).

Officer Vukovic generally arrives at work 15 to 20 minutes early to get dressed, talk to other officers and check assignments and citizen complaints. (Vukovic Depo.18-19). A couple times a month he talks to prosecutors before roll call. (Vukovic Depo. 21). A few times a week he stays after the end of this shift to confer with other officers on work-related matters. (Vukovic 26).

Officer Van Verth usually arrives at work 30 minutes before his shift begins. (Van Verth Depo. 21). When working in the vice unit, he would sometimes go in earlier to workout in the gym. (Van Verth Depo. 21-22). Officer Van Verth generally completes paperwork, checks his voice mail and returns calls prior to roll call. (Van Verth Depo. 22-24). He requests overtime compensation if he works more than 30 minutes prior to or after his shift. (Van Verth Depo. 24). Once a week, he has a ten or 15 minute conversation with an incoming officer. (Van Verth Depo. 26).

Officer Beckwith arrives approximately 15 minutes before the beginning of his shift and gets dressed. (Beckwith Depo.18). A couple times a week, prior to roll call, he answers telephone calls, completes paperwork or returns telephone calls. (Beckwith Depo. 24). After his shift, Officer Beckwith sometimes completes paperwork and answers telephone calls for up to 30 minutes. (Beckwith Depo. 26-27).

Officer Sudy generally arrives 15 to 20 minutes prior to the beginning of her shift to finish getting dressed and

collect her equipment. (Sudy Depo. 24). She then reviews the roll call folder, which contains a more detailed version of the information given during roll call. (Sudy Depo. 25-26). Two or three times a week, she looks up police reports regarding prior assignments and court subpoenas prior to roll call. (Sudy Depo. 30-31). Officer Sudy completes some paperwork on her home computer because the equipment at her district does not work well. (Sudy Depo. 29). Five to seven times a year, she says beyond the end of her shift to search a female arrestee or talk with incoming officers. (Sudy Depo. 34-37).

Officer Thomas usually arrives at work 30 minutes prior to the beginning of his shift. (Thomas Depo. 67). He uses the time to get ready and reduce his stress level. (Thomas Depo. 67). Other officers often ask him questions or confide in him regarding both personal and work-related issues prior to and after his shift. (Thomas Depo. 67-71).

In general, the officers take five to ten minutes to get dressed. (Kijauskas Depo. 20-21; Vukovic Depo.19; Sudy Depo. 25; Beckwith Depo.19). In addition, work-related conversation is often interspersed with personal matters and socializing. (Vukovic Depo.19; Thomas Depo. 21, 71-72; Gorman Depo. 37-39).

Officers are permitted to take a paid 30-minute meal period during their eight-hour shifts. (Hennessy Depo. 37; Beck Depo. 9). If an officer's meal period is requested and denied or interrupted by a call to duty, he or she may fill out an overtime card to receive an additional 30 minutes of straight time compensation. (Hennessy Depo. 38-39; Beck Depo. 9-10; CBA Art. XI,

§ 15(b)). Most lunches are not interrupted. (Kaloczi Depo. 30; Vukovic Depo. 29). The restrictions on meal periods are that the officer stay in uniform, remain in the district, provide his or her location to the dispatcher, carry a radio and respond to emergency or high priority calls. (Kaloczi Depo. 31; Vukovic Depo. 30-31). Officers may run personal errands, go to a restaurant or simply park somewhere during the meal period. (Kijauskas Depo. 32-33; Kaloczi Depo. 32; Sudy Depo. 43-45). Officer Sabo testified that he never attempts to take a meal period because his request is always denied. (Sabo Depo. 32-36). However, he also testified that his meal period is interrupted approximately once a month by a call to duty. (Sabo Depo. 34-35). In fact, his meal period has been interrupted 137 times in the last three years. (Sabo Depo. 36). Officer Richmond also testified that he does not usually take a meal period. (Richmond Depo. 25). The rest of the officers take meal periods on a daily basis.

Officers complete a daily duty report which documents their start and finish time, work activities, whether they took a meal period and whether the meal period was denied or interrupted. (Hennessy Aff. ¶¶5-6). In addition, officers complete an overtime card if appropriate. (Hennessy Aff. ¶ 5). These documents are to be completed prior to the end of the officer's shift. (Hennessy Aff. ¶ 5). Overtime cards are given to the officer's immediate supervisor, usually a sergeant, who has discretion to grant or deny the overtime compensation sought. (Hennessy Depo. 27-28).

The Complaint sets forth one cause of action alleging defendants have violated and continue to violate the

FLSA by failing to pay their employees all straight time and overtime compensation due under the Act.

On September 3, 1999, this Court bifurcated this case into Stage I (liability) and Stage II (damages). Plaintiffs moved for summary judgment as to all Stage I issues. Specifically, plaintiffs argued that defendant City of Cleveland violated §§ 207(k) and (o) and failed to properly credit its police officers for pre- and post-shift work, voluntary training and transportation of city-owned vehicles. Defendant City of Cleveland fn3 moved for summary judgment as to some, but not all, Stage I issues. Defendant argued that it is entitled to the § 207(k) partial overtime compensation exemption; it properly allows the use of compensatory time in compliance with § 207(o); plaintiffs' 30-minute meal period can be set off against any pre- and post-shift work for which plaintiffs are entitled to be compensated; and any remaining pre- and post-shift work for which plaintiffs claim they are entitled to be compensated is noncompensable under the Portal-to-Portal Act and/or the de minimis doctrine.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 72, which governs the matter herein inasmuch as timely objections have been made to the Report and Recommendation, provides in part:

(b) Dispositive Motions and Prisoner Petitions.

...The district judge to whom the case is assigned shall make a de nova determination upon the record, or after additional evidence, of any portion of the magistrate

judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

As stated in the Advisory Committee Notes, "The term `de novo' signifies that the magistrate's findings are not protected by the clearly erroneous doctrine, but does not indicate that a second evidentiary hearing is required." citing United States v. Raddatz 447 U.S. 667 (1980).

The Advisory Committee on Rules 1983 Addition noted that "[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." (citation omitted). In Thomas v. Arn, 474 U.S. 140,150 (1985), the Court held, "It does not appear that Congress intended to require district court review of a magistrate judge's factual or legal conclusions, under a de novo or any other standard, when neither party objects to those findings."

Summary Judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (citing Federal. R. Civ. P. 56(c)); see also LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir.1993). The burden of showing the absence of any such genuine issues of material facts rests with the moving party:

[A] party seeking summary judgment always bears the initial responsibility of informing the district court of

the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323 (citing Federal. R. Civ. P. 56(c)). A fact is material only if its resolution might affect the outcome of the lawsuit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party. Federal Rule of Civil Procedure 56(e) provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The court must afford all reasonable inferences and construe the evidence in the light most favorable to the nonmoving party. Cox v. Kentucky Dept. of Transp., 53 F.3d 146,150 (6th Cir. 1995) (citation omitted); see also United States v. Hodges X -Ray, Inc., 759 F.2d 557, 562 (6th Cir.1985). However, the nonmoving party may not simply rely on its pleading, but must "produce evidence that results in a conflict of material fact to be resolved by a jury." Cox, 53 F.3d at 150.

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of his case. Tolton v. American Biodyne, Inc., 48 F.3d 937, 941 (6th Cir.1995) (citing Celotex, 477 U.S. at 322). Accordingly, "[t]he mere existence of a scintilla of evidence in support of plaintiff s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Copeland v. Machulis, 57 F.3d 476, 479 (6th Cir.1995) (quoting Anderson, 477 U.S. at 52). Moreover, if the evidence is "merely colorable" or "not significantly probative," the court may decide the legal issue and grant summary judgment. Anderson, 477 U.S. at 249-250.

* * *

VII. Compensation Time System

Both parties moved for summary judgment on the issue of whether defendant's system of substituting compensatory time in lieu of cash overtime compensation violates the FLSA. Plaintiffs argued that defendant violates § 207(o) by denying officers access to the use of their compensatory time even when granting such use would not unduly disrupt police services. Plaintiffs pointed specifically to the fact that requests for the use of compensatory time are denied on the basis of minimum staffing requirements without allowing the substitution of other officers who would work at overtime rates. Plaintiffs sought strict application of the Secretary of Labor's interpretation of § 207(o), which has been set forth in Department of Labor regulations, an opinion letter and amicus briefs. According to plaintiffs, the Secretary has made it clear that the mere fact that overtime compensation of a

substitute officer may be required is not sufficient to justify denial of the use of compensatory time. Plaintiffs claimed that the compensatory time earned in lieu of cash is devalued under defendant's system because that system imposes a strict set of criteria for use under which 85% of the officers have had their requests denied.

Defendant argued that its use of the minimum car plan as the determinative factor for the granting or denial of the use of compensatory time complies with § 207(o). According to defendant, the minimum car plan ensures that sufficient personnel are on duty to maintain the safety of the officers and citizens of the City of Cleveland. Defendant claimed that it freely grants the use of compensatory time if there are enough officers available to fill the car plan. Defendant argued that the CBA prohibition against the pyramiding of overtime and the provision granting defendant the sole right to determine the necessity of overtime set forth the agreement between the parties that the use of compensatory time will not be granted where overtime compensation of a substitute officer would be required. Defendant claimed that the legislative history and purpose of § 207(o) indicate that the use of compensatory time in lieu of cash compensation was intended to be a cost saving measure. Defendant argued this purpose will be defeated if it is required to substitute officers at the overtime rate for those who desire to use compensatory time. Defendant also pointed to the fact that officers enjoy liberal use of compensatory time, with the average officer using 15.2 days of compensatory time each year.

Magistrate Judge Streepy noted that the parties agreed that compensatory time may be taken in accordance with operational needs and, pursuant to that agreement, defendant utilizes the minimum car plan. The magistrate judge then determined that the issues in this case have largely been resolved by the Sixth Circuit in Aiken v. Memphis, 190 F.3d 753 (6 h Cir.1999), and recommended summary judgment in favor of defendant.

Plaintiffs object to the magistrate judge's recommendation on this issue, arguing that his sole reliance on Aiken, which is distinguishable from the facts of this case, is misplaced. According to plaintiffs, the court's holding in Aiken is based on specific provisions of the parties' CBA. Since the CBA provisions in this case differ, plaintiffs argue that Aiken does not support summary judgment in favor of defendant.

Section 207(o) governs the use of compensatory time by public agencies such as defendant. Portions relevant to this dispute provide,

(1) Employees of a public agency ... may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
***
(5) An employee of a public agency...--
(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 C.F.R. § 553.25(d) further defines the term "unduly disrupt":

When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off.-For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

The issue in this case is whether the FLSA requires defendant to allow the substitution of officers who must be compensated at the overtime rate for officers who desire to make use of their compensatory time."fn 14 That is, whether defendant's denials of the use of compensatory time and refusals to allow substitutions at the overtime rate are based on its reasonable, good faith anticipation that to do so would impose an unreasonable burden on its ability to provide services of acceptable quality and quantity for the public.

Officer Kaloczi testified that he is granted use of his compensatory time less than one-third of the times he

requests it. (Kaloczi Depo.13). In three years, Officer Sabo requested the use of compensatory time 40 or 50 times, and his request was granted ten or 15 times. (Sabo Depo.17). Officer Kijauskas has been denied "lots of days off." (Kijauskas Depo.16). Officer Richmond has been denied the use of his compensatory time twice in the last three years. (Richmond Depo.11-12). Officer Vukovic, while working as a patrol officer, was denied the use of compensatory time 50% to 60% of the time. (Vukovic Depo.16). Officer Van Verth was denied the use of compensatory time ten times and granted the use of approximately 100 hours' worth during the first ten months of 2000. (Van Verth Depo.10). Officer Beckwith is denied the use of his compensatory time seven or eight times a year. (Beckwith Depo.10-11). Officer Sudy testified that when she worked on the first platoon in the Fourth District, "Nobody got comp time on day shift in the Fourth District for months and months and months at a time. I gave up even requesting it." (Sudy Depo.17).

Article XI, § 15(j) of the CBA provides that the use of compensatory time "shall be granted in accordance with the operational needs and upon reasonable request by the employee." The operational needs are based on a car plan, which is not specifically mentioned in the CBA. (Beck Depo. 41). As set forth above, under the CBA, requests are considered and granted on a first requested/first granted basis unless an emergency exists. (Art. XI, § 15')). "Family days" are given special priority and such compensatory time "shall be granted unless a conflict exists with the emergency operational needs of the Department." (Beck Depo. 21; Art. XI, § 15(k)). With regard to overtime, the CBA provides, "The City shall be the sole judge of the necessity for

overtime...There shall be no pyramiding of overtime or other premium pay compensation." (Art. XI, § 15(c)).

Plaintiffs rely on district court opinions, Department of Labor regulations, a 1994 opinion letter and amicus briefs in support of their position.

In Debraska v. Milwaukee, 131 F.Supp.2d 1032 (E.D. Wis. 2000), the police department had a policy to turn down requests to use compensatory time if granting the request would require it to pay replacement officers overtime or to call in replacements from another shift or precinct. The officers argued that this policy violated § 207(o). Id. at 1034. The city first argued that, since it always offered an alternative day off within one week of a denial, it complied with § 207(o) by granting compensatory time requests within a reasonable period. Id. at 1034. The court rejected this argument. Id. Alternatively, the city argued that allowing a substitute officer to work overtime or calling in an officer from another shift or precinct would always cause undue disruption to its operations. Id. at 1037. The court stated,

I cannot determine, based on the present record, whether this is true. I note, however, that the Secretary has opined ...that the mere fact that a comp time request might require another officer to work overtime does not, by itself, cause undue disruption. It is possible that adopting the measures proposed by the plaintiffs would in some cases or perhaps many cases impose an unreasonable burden, depending on the circumstances. The determination of that issue will have to await further proceedings.

Id. Thus, the court in Debraska did not fully address the issue currently before this Court.

In Canney v. Brookline, 2000 WL 1612703 (D. Mass. Oct. 9, 2000), the court held that the need to pay a substitute officer overtime compensation in order to allow another officer to use compensatory time does not constitute an undue disruption. Citing 29 C.F.R. § 553.25(d), the court stated,

On the present record nothing indicates that having to pay one or more officers overtime in cash, to permit another officer to take compensatory time would effect the police department's "ability to provide services of acceptable quality and quantity."
Id. The court also noted that the Department of Labor's interpretations of § 207(o) supported this conclusion. Id.

In Long Beach Police Officers Association v. Luman, No. CV 99-13090 (C.D. Cal. May 11, 2001), the plaintiffs challenged the police department's compensatory time policy of granting an officers' request to use compensatory time unless staffing levels would fall below established minimums. The court agreed "that granting an employee's request for compensatory time off is not required when that employee's absence would cause staffing to fall below the Department's established minimum level." Id. at 9. Prior to April 1999, the department did not have a policy to attempt to find a substitute officer to fill the shift or allow the requesting officer to find his or her own substitute. Id. Citing a Department of Labor opinion letter, the court held that this practice violated § 207(o) because "if the only disruption in the employer's ability to meet its staffing levels consists of the fact that the substitute

officer would be working overtime, the employer may not deny the request for compensatory time off." Id. at 8-9. After April 1999, the department adopted a policy to attempt to grant requests by finding another officer to cover the requesting officer's shift. Id. at 10. The court held that this policy, so long as it was followed in fact, did not violate § 207(o). Id.

Plaintiffs' position is supported by these opinions and in line with the Department of Labor's interpretation of § 207(o). The preamble to the regulation states,

The Department recognizes that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive.

52 Fed.Reg. 2012, 2017 (1987) (cited in Nebraska,131 F.Supp.2d at 1035). Similarly, in an opinion letter issued August 14, 1994, the Department of Labor's Wage and Hour Administrator stated,

It is our position ... that an agency may not turn. down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive.

1994 WL 1004861.

The parties vigorously dispute the level of deference to which the Department of Labor's interpretations of § 207(o) are entitled. The Supreme Court recently discussed this issue in Christensen v. Harris County, 529 U.S. 576 (2000). In Christensen, the plaintiffs and the United States as amicus curiae requested that the Court defer to a Department of Labor opinion letter. Id. at 586. The Court disagreed, stating,

In Chevron [USA., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)], we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute. Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law-do not warrant Chevron-style deference. Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in Skidmore v. Swift & Co., 323 U.S. 134 (1944), but only to the extent that those interpretations have the "power to persuade."

Id. at 586-587 (citations omitted). The Court noted that Chevron deference does apply to agency interpretations contained in regulations, if those regulations address the issue in dispute. Id. at 587. In addition, agency interpretations of ambiguous regulations are entitled to deference. Id. at 588. See

also Takacs v. Hahn Automotive Corp., 246 F.3d 776, 782 (6th Cir. 2001) (citing Auer v. Robbins, 519 U.S. 452 (1997)).

This Court finds that the regulation at issue in this case is not ambiguous. 29 C.F.R. § 553.25 clearly states that an agency may not deny a request for the use of compensatory time unless granting the request would be unduly disruptive, i.e., would impose an unreasonable burden on its ability to provide acceptable services to the public. Thus, the opinion letter cited by plaintiffs is entitled to respect only to the extent it has the power to persuade.

In light of the purpose of § 207(0), however, this Court finds the Department of Labor's position unreasonable. As noted by the Supreme Court, § 207(o) was designed "to ameliorate the burdens associated with necessary changes in employment practices" caused by the imposition of the FL SA on public employers. Moreau v. Klevenhagen, 508 U.S. 22, 26 (1993).

The projected "financial costs of coming into compliance with the FLSA--particularly the overtime provisions"-were specifically identified as a matter of concern to many States and localities.

Id. (citing S.Rep. No. 99-159, p. 8 (1985)). Thus, § 207(o) allowed public employers to compensate employees for overtime hours worked with compensatory time in lieu of cash payments. Id.

Defendant persuasively argues that, if public employers knew that they would be required to pay overtime to substitute officers in order to accommodate each and

every compensatory time request, the savings purpose of § 207(o) would be defeated and no employer would enter into a compensatory time agreement. If plaintiffs are correct, the granting of compensatory time in lieu of cash compensation becomes merely a method for the creation of additional overtime. It would be less expensive for defendant to pay all overtime in cash in the first place than to pay it in compensatory time and then have to pay overtime compensation to substitute officers when that compensatory time is used. The Department of Labor's interpretation of § 207(o) defeats the whole purpose of compensatory time. Thus, this Court does not find it has the power to persuade.

In Aiken,190 F.3d 753, the plaintiffs also challenged the city's compensatory time system. Under that system, an officer wishing to use his or her compensatory time was required to sign the precinct log book within 30 days prior to the requested day off. The precinct commanding officer monitored the log book to ensure that each shift was adequately staffed. Id. at 755. If the commanding officer determined "that further requests for time off would adversely affect the functioning of the unit," the log book would be closed for that day. Id. at 756. Like defendant in this case, the city in Aiken had a policy to not grant overtime compensation to one officer so that another could use his or her compensatory time on a requested date. Id. The officers argued that this policy violated § 207(o) because the city actually shut the logbooks at the point where it would be required to pay overtime compensation to substitute officers rather than at the point of undue disruption. Id. The Sixth Circuit affirmed dismissal of plaintiffs' claim, stating,

In this case, the city and the plaintiffs' union had an agreement on the issue of compensatory time. The agreement provided "the conditions under which an employee can take compensatory time off." 29 C.F.R. § 553.25. These include a condition that once a certain number of officers requested a specific day off, the commanding officer may close the precinct's log book for that day. The city and the union in this case have agreed, then, that the reasonable period for requesting the use of banked compensatory time begins thirty days prior to the date in question and ends when the number of officers requesting the use of compensatory time on the given date would bring the precinct's staffing levels to the minimum level necessary for efficient operation. We are loath to interfere with that agreement.

Id. at 757.

Thus, the Sixth Circuit in Aiken upheld an agreement whereby officers were denied the use of compensatory time rather than allowing another officer to earn overtime compensation. Thus, it is clear that the court did not conclude that a public employer must pay overtime compensation to substitute officers in order to grant the use of compensatory time.

Although not identical, the agreement in this case is similar to the parties' agreement in Aiken. Both are based on the premise that minimum staffing levels must be met in order for an officer to make use of his or her compensatory time on any particular day. In addition, both systems require denial of the use of compensatory time rather than permit substitution of officers at the overtime rate.

In light of Aiken and the purpose of § 207(o), this Court holds that § 207(o) does not require a public employer to pay one employee overtime compensation in order for another employee to make use of his or her accrued compensatory time, if to do so would unduly disrupt the employer's operations. Thus, this Court holds that defendant's compensatory time system does not, as a matter of law, violate § 207(o).

In his affidavit, Officer Hennessy sets forth the following statistics:

In 1998, 182,651.75 hours of compensatory time, amounting to 22,831 days, were taken by about 1,550 patrol officers of the Cleveland Police Department.

In 1999, this amount increased to 197,412 hours, or about 24,676 days were taken by approximately 1,550 patrol officers.

In 2000, 153,554.75 hours were taken through October 29th, and it is estimated that more than 185,000 hours will be used by the end of the year.

(Hennessy Aff. ¶¶14-16). The precise amount of compensatory time requested and denied is not known. In addition, it is surely impossible to calculate the amount of compensatory time which could have been granted if a substitute officer had been permitted to earn overtime compensation. However, this Court can reasonably conclude that, if defendant were required to pay overtime compensation sufficient to grant even a fraction of the denied requests, the cost would amount to more than a mere inconvenience. Requiring

defendant to pay overtime compensation for tens of thousands of hours so that officers can more readily use their compensatory time would impose an unreasonable burden on its ability to provide police services of acceptable quality and quantity.

Therefore, this Court accepts the recommendation of Magistrate Judge Streepy to grant defendant's motion for summary judgment as to this issue.

CONCLUSION

For the foregoing reasons, the February 22, 2001 Memorandum and Order of Magistrate Streepy striking the unsworn testimony submitted by plaintiffs is upheld and the Report and Recommendation is accepted in part and rejected in part. This Court hereby:

1. upholds Magistrate Judge Streepy's order granting defendant City of Cleveland's Motion to Strike Unsworn Testimony from Plaintiff's Motion for Summary Judgment;

2. accepts Magistrate Judge Streepy's recommendation that defendant properly adopted seven- and eight-day work periods pursuant to § 207(k) which entitle -officers to overtime compensation after they have worked 43 and 49 hours, respectively, in a given work period;

3. accepts Magistrate Judge Streepy's recommendation that the pre- and post-shift activities engaged in by officers constitute compensable work;

4. accepts Magistrate Judge Streepy's recommendation that time spent by an officer performing compensable pre- and post-shift work may be offset by the bona fide meal periods taken by him or her during the same work period;

5. rejects Magistrate Judge Streepy's recommendation that ten minutes serve as the cutoff for de minimis work and instead holds that the evidence establishes that any time spent by officers engaged in pre- and post-shift work after offset is de minimis and noncompensable;

6. accepts Magistrate Judge Streepy's recommendation that officers' off-duty consultation with prosecutors, though compensable work, is de minimis and noncompensable and sua sponte grants summary judgment in favor of defendant on this issue;

7. accepts Magistrate Judge Streepy's recommendation that the waiting period between the end of an officer's shift and a court appearance is not work time and sua sponte grants summary judgment in favor of defendant on this issue;

8. accepts Magistrate Judge Streepy's recommendation that time spent in voluntary firearms and scuba training is not work time and sua sponte grants summary judgment in favor of defendant on these issues;

9. rejects Magistrate Judge Streepy's recommendation that a genuine issue of material fact exists with regard to the transporting of defendant's vehicles and instead holds that such time is

noncompensable and sua sponte grants summary judgment in favor of defendant on this issue;

10. accepts Magistrate Judge Streepy's recommendation that a genuine issue of material fact exists with regard to whether defendant includes shift differentials in the calculation of an officer's regular rate of pay;

11. accepts Magistrate Judge Streepy's recommendation that defendant's compensatory time system complies with § 207(o).

Thus, summary judgment is granted in favor of defendant City of Cleveland as to (1) defendant's entitlement to the § 207(k) partial overtime exemption; (2) defendant's compliance with § 207(o); (3) pre- and post-shift activities; (4) off-duty consultation with prosecutors; (5) the waiting period between the end of an officer's shift and a court appearance; (6) firearms training; (7) scuba training; and (8) transportation of defendant's vehicles.

Summary judgment is denied as to (1) street survival training and (2) shift differentials.

IT IS SO ORDERED.

Fn1The Complaint was originally filed by thirty-five named plaintiffs. (Compl. 11). On December 17, 1999 and June 6, 2000, this Court granted plaintiffs' unopposed motions to add 1,356 consenters.

Fn2 Plaintiffs filed a document entitled Police Officers' Statement of Facts Not in Dispute in connection with their Motion for Summary Judgment (hereafter "Facts"). The Facts have not been averred to but generally summarize other evidence. In some instances, however, the Facts are the sole location of information referred to by the parties.

FN 3Defendant Cleveland Police Department has not joined in any of the dispositive motions discussed in this recommendation. Unless otherwise noted, the term "defendant" refers only to defendant City of Cleveland.

fn 14Although the parties mention the "reasonable period" provision of § 207(o), there
is no genuine dispute as to whether requests to use compensatory time are granted within a reasonable period. Rather, the real dispute concerns defendant's policy of granting compensatory time only up to the point where the minimum car plan is full and refusing to allow officers who would be compensated at the overtime rate to substitute for the officer requesting the use of compensatory time.

No. 02-3669
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert Beck, et al.,
Plaintiffs-Appellants,

v.

City of Cleveland, Ohio,
Defendant-Appellee.

January 21, 2005, Filed

JUDGES: BEFORE: DAUGHTREY and GILMAN, Circuit Judges; and HAYNES, * District Judge.

OPINION: ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied with one correction to the opinion at page 4, line 9; thirteen point five (13.5) hours is changed to fifteen point two (15.2) days.

---------- Footnotes ----------

* Hon. William J. Haynes, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

29 USC Sec 207 (o)-(q)

(o) Compensatory time.

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only--

(A) pursuant to--

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3) (A) If the work of an employee for which compensatory time may be provided included work in a

public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than--

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher[.]

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if--

(A) such employee is paid at a per-page rate which is not less than--

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection--

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the

employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution.

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency--

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency,

the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education. Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is--

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER V -- WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR
SUBCHAPTER A -- REGULATIONS
PART 553 -- APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES OF STATE AND LOCAL GOVERNMENTS
SUBPART A -- GENERAL
SECTION 7(O) -- COMPENSATORY TIME AND COMPENSATORY TIME OFF

§ 553.20 Introduction.

Section 7 of the FLSA requires that covered, nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards. However, section 7(o) of the Act provides an element of flexibility to State and local government employers and an element of choice to their employees or the representatives of their employees regarding compensation for statutory overtime hours. The exemption provided by this subsection authorizes a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, to provide compensatory time off (with certain limitations, as provided in § 553.21) in lieu of monetary overtime compensation that would otherwise be required under section 7. Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for

overtime is calculated at the rate of not less than one and one-half times the regular rate of pay.

§ 553.21 Statutory provisions.

Section 7(o) provides as follows:

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only --

(A) Pursuant to --

(i) Applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) In the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) If the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than --

(A) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) The final regular rate received by such employee, whichever is higher.

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency --

(A) Who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) Who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection --

(A) The term overtime compensation means the compensation required by subsection (a), and

(B) The terms compensatory time and compensatory time off means hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

Sec. 553.22 ``FLSA compensatory time'' and ``FLSA compensatory time off''. (a) Compensatory time and compensatory time off are interchangeable terms under the FLSA. Compensatory time off is paid time off the job which is earned and accrued by an employee in lieu of immediate cash payment for employment in excess of the statutory hours for which overtime compensation is required by section 7 of the FLSA.

(b) The Act requires that compensatory time under section 7(o) be earned at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by section 7 of the FLSA. Thus, the 480-hour limit on accrued compensatory time represents not more than 320 hours of actual overtime worked, and the 240-hour limit represents not more than 160 hours of actual overtime worked.

(c) The 480- and 240-hour limits on accrued compensatory time only apply to overtime hours worked after April 15, 1986. Compensatory time which an employee has accrued prior to April 15, 1986, is not subject to the overtime requirements of the FLSA and need not be aggregated with compensatory time accrued after that date.

Sec. 553.23 Agreement or understanding prior to performance of work.

(a) General. (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of

understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime compensation only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

(2) Agreements or understandings may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements or understandings may provide for any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least ``time and one-half'' is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).

(b) Agreement or understanding between the public agency and a representative of the employees. (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the

representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

(2) Section 2(b) of the 1985 Amendments provides that a collective bargaining agreement in effect on April 15, 1986, which permits compensatory time off in lieu of overtime compensation, will remain in effect until the expiration date of the collective bargaining agreement unless otherwise modified. However, the terms and conditions of such agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of section 7(o) of the Act and these regulations.

(c) Agreement or understanding between the public agency and individual employees. (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept. (See Sec. 553.50.) An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees. The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may take the form of an express condition of employment,

provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

(2) Section 2(a) of the 1985 Amendments provides that in the case of employees who have no representative and were employed prior to April 15, 1986, a public agency that has had a regular practice of awarding compensatory time off in lieu of overtime pay is deemed to have reached an agreement or understanding with these employees as of April 15, 1986. A public agency need not secure an agreement or understanding with each employee employed prior to that date. If, however, such a regular practice does not conform to the provisions of section 7(o) of the Act, it must be modified to do so with regard to practices after April 14, 1986. With respect to employees hired after April 14, 1986, the public employer who elects to use compensatory time must follow the guidelines on agreements discussed in paragraph (c)(1) of this section.

Sec. 553.24 "Public safety", "emergency response", and "seasonal" activities.

(a) Section 7(o)(3)(A) of the FLSA provides that an employee of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, may accumulate not more than 480 hours of compensatory time for FLSA overtime hours which are worked after April 15, 1986, if the employee is engaged in ``public safety'', ``emergency response'', or ``seasonal'' activity. Employees whose work includes ``seasonal'', ``emergency response'', or ``public safety'' activities, as well as other work, will not be subject to both limits of accrual for compensatory time. If the employee's work regularly involves the activities included in the 480-hour limit, the employee will be covered by that limit. A public agency cannot utilize the higher cap by simple classification or designation of an employee. The work performed is controlling. Assignment of occasional duties within the scope of the higher cap will not entitle the employer to use the higher cap. Employees whose work does not regularly involve ``seasonal'', ``emergency response'', or ``public safety'' activities are subject to a 240-hour compensatory time accrual limit for FLSA overtime hours which are worked after April 15, 1986.

(b) Employees engaged in ``public safety'', ``emergency response'', or ``seasonal'' activities, who transfer to positions subject to the 240-hour limit, may carry over to the new position any accrued compensatory time. The employer will not be required to cash out the accrued compensatory time which is in excess of the lower limit. However, the employee must be compensated in cash wages for any subsequent overtime hours worked until the number of accrued hours of compensatory time falls below the 240-hour limit.

(c) ``Public safety activities'': The term ``public safety activities'' as used in section 7(o)(3)(A) of the Act includes law enforcement, fire fighting or related activities as described in Sec. Sec. 553.210 (a) and (b) and 553.211 (a)-(c), and (f). An employee whose work regularly involves such activities will qualify for the 480- our accrual limit. However, the 480-hour accrual limit will not apply to office personnel or other civilian employees who may perform public safety activities only in emergency situations, even if they spend substantially all of their time in a particular week in such activities. For example, a maintenance worker employed by a public agency who is called upon to perform fire fighting activities during an emergency would remain subject to the 240-hour limit, even if such employee spent an entire week or several weeks in a year performing public safety activities. Certain employees who work in ``public safety'' activities for purposes of section 7(o)(3)(A) may qualify for the partial overtime exemption in section 7(k) of the Act. (See Sec. 553.201)

(d) ``Emergency response activity'': The term ``emergency response activity'' as used in section 7(o)(3)(A) of the Act includes dispatching of emergency vehicles and personnel, rescue work and ambulance services. As is the case with ``public safety'' and ``seasonal'' activities, an employee must regularly engage in ``emergency response'' activities to be covered under the 480-hour limit. A city office worker who may be called upon to perform rescue work in the event of a flood or snowstorm would not be covered under the higher limit, since such emergency response activities are not a regular part of the employee's job. Certain employees who work in ``emergency response'' activities for purposes of section 7(o)(3)(A) may qualify

for the partial overtime exemption in section 7(k) of the Act. (See Sec. 553.215.)

(e)(1) ``Seasonal activity'': The term ``seasonal activity'' includes work during periods of significantly increased demand, which are of a regular and recurring nature. In determining whether employees are considered engaged in a seasonal activity, the first consideration is whether the activity in which they are engaged is a regular and recurring aspect of the employee's work. The second consideration is whether the projected overtime hours during the period of significantly increased demand are likely to result in the accumulation during such period of more than 240 compensatory time hours (the number available under the lower cap). Such projections will normally be based on the employer's past experience with similar employment situations.

(2) Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather. As an example, employees processing tax returns over an extended period of significantly increased demand whose overtime hours could be expected to result in the accumulation during such period of more than 240 compensatory time hours will typically qualify as engaged in a seasonal activity.

(3) While parks and recreation activity is primarily seasonal because peak demand is generally experienced in fair weather, mere periods of short but intense activity do not make an employee's job seasonal. For example, clerical employees working increased hours for several weeks on a special project or assigned to an afternoon of shoveling snow off the courthouse steps would not be considered engaged in seasonal activities, since the increased activity would not result in the accumulation during such period of more than 240

compensatory time hours. Further, persons employed in municipal auditoriums, theaters, and sports facilities that are open for specific, limited seasons would be considered engaged in seasonal activities, while those employed in facilities that operate year round generally would not.

(4) Road crews, while not necessarily seasonal workers, may have significant periods of peak demand, for instance during the snow plowing season or road construction season. The snow plow operator/road crew employee may be able to accrue compensatory time to the higher cap, while other employees of the same department who do not have lengthy periods of peak seasonal demand would remain under the lower cap.

29 CFR 553.25

§ 553.25 Conditions for use of compensatory time ("reasonable period", "unduly disrupt").

(a) Section 7(o)(5) of the FLSA provides that any employee of a public agency who has accrued compensatory time and requested use of this compensatory time, shall be permitted to use such time off within a "reasonable period" after making the request, if such use does not "unduly disrupt" the operations of the agency. This provision, however, does not apply to "other compensatory time" (as defined below in § 553.28), including compensatory time accrued for overtime worked prior to April 15, 1986.

(b) Compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the right to use compensatory time earned and

must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time.

(c) Reasonable period. (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.

(2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work. (See § 553.23.) To the extent that the (conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in § 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period".

(d) Unduly disrupt. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an

employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

Sec. 553.26 Cash overtime payments.

(a) Overtime compensation due under section 7 may be paid in cash at the employer's option, in lieu of providing compensatory time off under section 7(o) of the Act in any workweek or work period. The FLSA does not prohibit an employer from freely substituting cash, in whole or part, for compensatory time off; and overtime payment in cash would not affect subsequent granting of compensatory time off in future workweeks or work periods. (See Sec. 553.23(a)(2).)

(b) The principles for computing cash overtime pay are contained in 29 CFR part 778. Cash overtime compensation must be paid at a rate not less than one and one-half times the regular rate at which the employee is actually paid. (See 29 CFR 778.107.)

(c) In a workweek or work period during which an employee works hours which are overtime hours under FLSA and for which cash overtime payment will be made, and the employee also takes compensatory time off, the payment for such time off may be excluded from the regular rate of pay under section 7(e)(2) of the Act. Section 7(e)(2) provides that the regular rate shall not be deemed to include. . . payments made for occasional periods when no work is performed due to vacation, holiday, . . . or other similar cause.

As explained in 29 CFR 778.218(d), the term ``other similar cause'' refers to payments made for periods of absence due to factors like holidays, vacations, illness, and so forth. Payments made to an employee for periods of absence due to the use of accrued compensatory time are considered to be the type of payments in this ``other similar cause'' Sec. 553.27 Payments for unused compensatory time.

(a) Payments for accrued compensatory time earned after April 14, 1986, may be made at any time and shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(b) Upon termination of employment, an employee shall be paid for unused compensatory time earned after April 14, 1986, at a rate of compensation not less than--

(1) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(2) The final regular rate received by such employee, whichever is higher.

(c) The phrase last 3 years of employment means the 3-year period immediately prior to termination. Where an employee's last 3 years of employment are not continuous because of a break in service, the period of employment after the break in service will be treated as new employment. However, such a break in service must have been intended to be permanent and any accrued compensatory time earned after April 14, 1986, must have been cashed out at the time of initial separation. Where the final period of employment is less than 3 years, the average rate still must be

calculated based on the rate(s) in effect during such period.

(d) The term ``regular rate'' is defined in 29 CFR 778.108. As indicated in Sec. 778.109, the regular rate is an hourly rate, although the FLSA does not require employers to compensate employees on an hourly basis.

Sec. 553.28 Other compensatory time.

(a) Compensatory time which is earned and accrued by an employee for employment in excess of a nonstatutory (that is, non-FLSA) requirement is considered ``other'' compensatory time. The term ``other'' compensatory time off means hours during which an employee is not working and which are not counted as hours worked during the period when used. For example, a collective bargaining agreement may provide that compensatory time be granted to employees for hours worked in excess of 8 in a day, or for working on a scheduled day off in a nonovertime workweek. The FLSA does not require compensatory time to be granted in such situations.

(b) Compensatory time which is earned and accrued by an employee working hours which are ``overtime'' hours under State or local law, ordinance, or other provisions, but which are not overtime hours under section 7 of the FLSA is also considered ``other'' compensatory time. For example, a local law or ordinance may provide that compensatory time be granted to employees for hours worked in excess of 35 in a workweek. Under section 7(a) of the FLSA, only hours worked in excess of 40 in a workweek are overtime hours which must be compensated at one and one-half times the regular rate of pay.

(c) Similarly, compensatory time earned or accrued by an employee for employment in excess of a standard established by the personnel policy or practice of an employer, or by custom, which does not result from the FLSA provision, is another example of ``other'' compensatory time.

(d) The FLSA does not require that the rate at which ``other'' compensatory time is earned has to be at a rate of one and one-half hours for each hour of employment. The rate at which ``other'' compensatory time is earned may be some lesser or greater multiple of the rate or the straight-time rate itself.

(e) The requirements of section 7(o) of the FLSA, including the limitations on accrued compensatory time, do not apply to ``other'' compensatory time as described above.

Other Exemptions

1994 WL 1004861 (DOL WAGE-HOUR)

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
August 19, 1994

***

This is in response to your inquiry concerning compensatory time off (CTO) under the provisions of §7(o) of the Fair Labor Standards Act (FLSA). The specific issue of concern is whether the understanding between the *** Police Officers Association (*** POA) and the City concerning the use of compensatory time off is consistent with §7(o).
As a condition for use of compensatory time in lieu of overtime payment in cash, §7(o)(2)(A) of the FLSA requires an agreement or understanding be reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement (CBA), a memorandum of understanding or any other agreement between the public agency and representatives of the employees. The understanding may be oral or written. See §§29 CFR 553.23(a) and (b). The information you have provided indicates that a memorandum of understanding (MOU) exists between the POA and the City concerning compensatory time for police officers. The MOU has provisions governing the preservation, use, and cashing out of compensatory time. The relevant portion of the MOU indicates that: "[r]equests for CTO are to be submitted with adequate advance notice and are subject to management

approval based on the following:
1. scheduling needs
2. only one officer per watch will receive CTO approval."

Further, according to Chief ***, police officers may now accrue up to 80 hours of compensatory time off. The Chief also indicates that commanders have attempted to accommodate additional off-duty requests by allowing "trades" between officers, and by adjusting schedules to allow earlier or later reporting for duty. However, the denial of compensatory time off does occur on a limited basis according to the Chief. Conditions for the use of compensatory time are discussed in 29 CFR §553.25. As indicated in 553.25(d), a request for compensatory time off shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off.

It is our position, notwithstanding the MOU, that an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive.

Thus, to the extent that the MOU conditions under the CBA are inconsistent with the above, the MOU is considered to be invalid. The United States Supreme Court has held that a CBA provision that waives employees' statutory rights under the FLSA is invalid.

See Barrentine v. Arkansas-Best Freight System, 450 U.S. 728.

We trust that the above is responsive to your inquiry.

Sincerely,

MariaEchaveste
Administrator

CIVIL ACTION 96-C-0402

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BRADLEY DEBRASKA, ET AL., PLAINTIFFS,

v.

CITY of MILWAUKEE, DEFENDANT.

BRIEF OF THE SECRETARY OF LABOR AS ANICUS CURIAE INTEREST OF THE SECRETARY OF LABOR

By letter dated February 28, 2000, this Court requested, consistent with Auer. v. Robbins, 519 U.S. 452 (1997), that the Department of Labor submit an amicus brief presenting the Department's interpretation of the compensatory time (comp. time) provision of the Fair Labor Standards Act (FLSA), 2 9 U.S.C. 207 (o) (5), and implementing regulations, 29 C.F.R.553.20-.28, as applicable to this case.

The Secretary has a significant interest in this case. The question before this Court raises significant and recurring issues as to the proper scope of the comp. time exception to the overtime provision of the FLSA. The regulations promulgated by the Secretary construing the comp. time provision, as well as the Secretary's interpretation of the regulations set forth in the preamble to the regulations, Wage and Hour opinion letters and this amicus brief are entitled to considerable deference. See Auer v. Robbins, 519 U.S. 452, 461-62 (1997).

In its briefs filed with this Court and the court of appeals, the City of Milwaukee ("the City"), relying on the language of section 7 (o) (5) and the regulation at 29 C.F.R. 553.25 (c), asserts that the parties to its collective bargaining agreement have agreed to a "reasonable period" within which comp. time must be requested, and that this "reasonable period" governs not only the timing of a request for comp. time, but also the circumstances under which a request will be granted. The City also contends that as long as it grants the use of comp. time within a "reasonable period" after such time off is requested, it need not grant comp. time for the date requested by the employee, whether or not the use of comp. time is "unduly disruptive" to its operations. These interpretations are entirely inconsistent with the Secretary's longstanding interpretation of the statute and regulations and would, for all practical purposes, read the phrase "unduly disruptive" out of the statute.

ISSUE PRESENTED

Whether, under section 7 (o) (5) of the Fair Labor Standards Act,29 U. S.C. 201 et seq., 207 (o) (5)("FLSA") , the Police Department of the City of Milwaukee, Wisconsin ("City") may deny police officers the use of accrued compensatory time on the days they have requested without establishing that such use of compensatory time unduly disrupts the operations of the City.

STATEMENT OF THE CASE AND FACTS

Police officers employed by the City brought suit against their employer, asserting various claims under

the FLSA and their collective bargaining agreement. These claims were the subject of a prior district court decision which was appealed to the United States Court of Appeals for the Seventh Circuit. The court of appeals remanded the case to the district court for a determination of the employees' challenge to the City's system for the officers use of compensatory time off pursuant to section 7 (o) (5) . DeBraska v. City of Milwaukee, 189 F.3d 650 (7th Cir. 1999).

The City and the Milwaukee Police Association, Local 21, I.U.P.A., AFL-CIO (MPA), which represents the police officers, have entered into a collective bargaining agreement which specifically allows for the accrual and use of comp. time pursuant to the FLSA. The agreement provides that "a police officer must give 'reasonable advance notice' to his/her commanding officer of a request to use CTO [comp. time] and the dates requested. [T] he commanding officer has the discretion as to whether to grant or deny the police officer's request to use accumulated CTO, and may grant such request only if he/she determines that the dates requested are 'available...in accordance with the needs of the Police Service.' [T]he exercise of discretion by the commanding officer in this respect is 'final' and competing requests for use of accumulated CTO on particular dates are to be resolved on a "first come, first-serve basis."

Defendant's Proposed Findings of Fact (DF) No. 31. Comp. time leave requests also compete on a first come, first served basis with all other leave requests. Defendant's Proposed Findings of Fact, Nos. 36, 43.

The City has established staffing requirements for the Department's Patrol Bureau, where the plaintiffs are employed. Under current staffing requirements, at least 55% of all police officers must be on duty and working at any given time unless a higher percentage is required due to a special event or unusual circumstance. Defendant's Proposed Undisputed Facts (PF) Nos. 38 and 40. It is not disputed that " [n]o requests for CTO are granted unless, at minimum, the routine staffing levels are met," and "[n]o of effort is made to fill positions from outside the shift, from other locations, or to accommodate the request in any way which requires the payment of overtime." Id. The City thus will not require a replacement officer to work overtime (presumably even if compensated with comp. time hours) in order to allow another worker to use accrued comp. time. Supplemental Brief of Defendant City of Milwaukee, on Remand, page 3.

ARGUMENT

THE CITY'S SYSTEM FOR ITS EMPLOYEES' USE OF ACCRUED COMPENSATORY TIME OFF DOES NOT TAKE INTO ACCOUNT ALL THE STATUTORY REQUIREMENTS.

A. Statutory and Regulatory Background

Section 7(o) of the Fair Labor Standards Act, 29 U.S.C. 207(o), permits employees of state and local governments to receive compensatory time off, in lieu of overtime compensation, at a rate of at least one and one-half hours off for each overtime hour worked. 29 U.S.C. 207(o)(1). Congress crafted this exemption to the Act's overtime requirements in order "to provide

flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours." H.R. Rep. No. 331, 99th Cong., 1st Sess. 19 (1985). The provision was intended to give "freedom and flexibility" to public employees and "additional options" to employers. Id. at 20.

Section 7(o) has a detailed scheme for the accrual and use of comp. time. Subsection 7(o)(1) authorizes the use of comp. time in lieu of cash overtime. Subsection 7(o) (2) specifies how a comp. time plan comes into existence. Subsection 7(o)(3) provides limits for the amount of comp. time that may be accrued. Subsection 7(o)(4) sets the requirements for cashing out comp. time upon an employee's termination. And subsection 7(o) (5) provides the condition under which an employee may use comp. time.

Section 7(o)(5), which is the basis for plaintiffs' action, provides that an employee who asks to use accrued compensatory time:

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U. S. C. 207 (o) (5) (emphasis added) .

Congress granted the Secretary broad rulemaking authority to interpret section 7 (o) . The 1985 Amendments to the Fair Labor Standards Act, which contain the comp. time provision, expressly direct the Secretary of Labor "to promulgate such regulations

as may be required to implement (the) amendments." Pub. L. No. 99150, ,Sec. 6, 99 Stat. 790 (29 U.S.C. 203 note) . The Secretary complied with this directive with respect to use of compensatory time by issuing regulations codified at 29 C.F.R. 553.20 through 553.28. Section 553.25 distinguishes between what constitutes a "reasonable period" and what constitutes "unduly disrupt," as these terms are used in section 7 (o) (5) of the statute. It provides:

(c) Reasonable period. (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case . . . . (2) To the extent that the conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in §553.23,fn1 the terms of such agreement or understanding will govern the meaning of "reasonable period."

(d) Unduly, disrupted. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for. denial of a request for compensatory time off. (See H.Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

The instant case turns on the interpretation and application of these regulations.

Where, as here, there is an explicit delegation of substantive rulemaking authority, the agency's regulations are entitled to "more than mere deference or weight," they are entitled to "legislative effect." Schweiker v. Gray_ Panthers, 453 U.S. 34, 44 (1981) (quoting Satterton v. Francis, 432 U.S. 416, 426 (1977)).

Equally significant, the Labor Department's interpretation of its own regulations is entitled to a high degree of deference. Auer v. Robbins, 519 U.S. 452, 457 (1997). The Secretary's interpretation "is controlling unless 'plainly erroneous or inconsistent with the regulation'" Klem v. County of Santa Clara 2000 WL 339751 (9th Cir. April 3, 2000) "Because of the high degree of deference owing to the Secretary's interpretation of her own rules, [a court] need not conclude that her interpretation is the only reasonable construction of that rule, or even the best one. It merely must be sufficiently connected to the rule's text to be consistent with the rule." Klem at page 6. The Secretary's interpretations may be articulated in the preamble to the regulations, Wage and Hour opinion letters or, as in Auer and Klem, amicus briefs. Here, the Secretary's position was formulated when the comp. time regulations were first promulgated and reiterated in an opinion letter, and is now restated in this amicus brief.

The preamble to the Secretary's regulations provides that "[t]he Department recognizes that situations may arise in which overtime may be required of one

employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive." 52 Fed. Reg. 201.2, 2017 (1987).

In addition, on August 19, 1994, the Wage and Hour Administrator issued an opinion letter fn2 which provides, in pertinent part, that "[i]t is our position, notwithstanding [an agreement between the Police officers Association and the City], that an agency may not turn down a request from an employee for compensatory time off. unless it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for. an employer to claim that the compensatory time off request is unduly disruptive."

B. Under the Secretay's Interpretation, once an Employee Provides Adequate Notice of his Request for Leave that Leave Must be Granted Unless it would Unduly Disrupt "the Agency's operations.

Section 7(o) (5) should be interpreted to balance the right of employees to use their accrued comp. time with the employer's need to perform its mission. As Congress noted

The Committee has sought to balance the employee's right to make use of compensatory time that has been

earned and the employer's interests in avoiding a disruption in operations.

House Report 99-331., page 21 (emphasis added). This balancing is accomplished by treating an employee's request to use his or her accrued comp. time as involving a two-stage process. First, the employee must give his employer reasonable notice of his request for the use of accrued comp. time. The employee and the employer may agree, in advance, as to how much notice is reasonable, as provided in 29 C.F.R. 553.25(c). This first step is recognized in the collective bargaining agreement in the instant case, which specifically provides that "a police officer must give 'reasonable advance notice' to his/her commanding officer of a request to use CTO. " DF No. 31. If the employee does not give reasonable notice, the request for comp. time may be denied with no additional justification. But if adequate notice is provided, the burden shifts to the employer under section 553.25(d) to show that the taking of comp. time would unduly disrupt the employer's operations before the employer is authorized to deny the employee's right for leave. This is how Congress intended the statutory scheme to work, accommodating the interests of both employers and employees. This two-step procedure is explained in thelegislative history:

The employee also has the right to use some or all of accrued compensatory time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operations. Use of the term "reasonable" is intended to accommodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request

for the use of compensatory time that request should be honored unless to do so would be unduly disruptive. By the term "unduly disrupt," the Committee means something more than mere inconvenience.

H.R. Rep. No. 99-331, at 23 (1985) (emphasis added) ; accord, S. Rep. No. 99-159 at 12 (1985).

In conformity with this legislative history, the regulation defining "undue disruption" makes clear that a specific request for a specific day of leave must be granted in the absence of an "undue disruption.""For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services." 29 C.F.R. 553.25(d) (emphasis added).

This is consistent with the structure of the overtime provisions of the FLSA and its comp. time exemption. The FLSA establishes a general rule that an employer must pay its employees a cash premium for their overtime hours. Section 7(o) provides a limited exemption to this rule. It allows the employer, with the employee's agreement, to substitute a time off equivalent for cash payment. "An employee has the right to use comp. time" he receives (29 C.F.R. 553.25(b)) just as he has the right to use the cash he receives as overtime pay. This right is subject only to the stipulation that the use of the time shall not create an undue disruption in the employer's operations. As

stated by the court in Heaton v. Moore, 43 F.3d 1176, 1180 (8th Cir. 1994) (emphasis added),

> banked (comp.) time belongs to the employee. Section 207 (o) (5) specifically gives the employee the right of access to and control of the use of that banked time subject only to the employer's right to deny requested uses by the employee that would unduly disrupt the employer's operation. As the employee would have the right to spend the employee's cash overtime pay when and as the employee chose, so the employee should be allowed to spend the banked compensatory time as the employee chooses subject only that the employee not 'unduly disrupt' the public employer's operations in doing so.

The court in Heaton also stated that the payment of overtime compensation to other employees is not "unduly disruptive." Id. at 1181.

This Interpretation also is consistent with congressional intent as expressed in the legislative history of the 1985 Amendments. Congress enacted the compensatory time provisions in part to aid state and local governments with their budgetary priorities following the Supreme Court's ruling in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), that the FLSA's overtime provisions applied to them. H.R. Rep. No. 99-331 at 18. However, Congress also intended section 7(o) to preserve the "freedom and flexibility" enjoyed by public employees" (see H.R. Rep. No. 99-331, at 20). Congress permitted employees to agree to the provision of compensatory time rather than overtime pay on the premise that they could thereby enjoy otherwise unavailable

opportunities to take extended vacations, care for relatives, and attend to other family or personal matters. See Hearing on the Fair Labor Standards Act Before the Subcomm. on Labor Standards of the House Comm. On Educ. & Labor, 99th cong., 1st Sess. 4, 71, 150, 205, 224-225 (1985) ; Fair Labor Standards Amendments of 1985: Hearings on S. 1570 Before the Subcomm. on Labor, of the Senate Comm. On Labor & Human Resources, 99th Cong., 1st Sess. 17, 96, 109--110, 275, 311, 374-375, 492-493, 520, 573 (1985). Allowing the employee to determine when to use comp. time, subject only to providing adequate notice and not unduly disrupting an agency's operations, preserves this "freedom and flexibility." See Public Citizen v. United States Department of Justice, 491 U.S. 440, 455 (1989) (" '... statutes always have some purpose: or objective to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'" (citations omitted) .

Here, there is no dispute that even where reasonable notice provided, a City police officer will not be given leave when staffing on the shift at his or her particular location falls below 55%. No consideration is given to whether another employee is willing and able to work on an overtime basis or can be brought in from another shift or location which is more appropriately staffed for that day. Without some consideration of at least these variables, there can be no claim of an undue disruption. In fact, the City cannot say, for it does not know, whether an undue disruption will occur."Congress expected some disruption of the employer's operation to occur as a result of an employee' decision to use compensatory time when the employee wants to do so. The employer may only deny

an employee's request to use compensatory time when the proposed use would 'unduly disrupt the employer's operation." Heaton v. Moore, 43 F.3d 1176, 1181 (8th Cir. 1994)(emphasis in original).

Because the right to request and receive comp. time in the absence of an undue disruption to the employer's operations is provided by statute and regulation, it may not be bargained away through the collective bargaining process. See Wage and Hour opinion letter of August 19, 1994, 1995 WL 958635. The Supreme Court has consistently recognized that employees cannot prospectively waive or abridge their FLSA rights by contract or agreement because such waivers would subvert the purposes and legislative policies underlying the Act. See Alamo Foundation v. Secretary of Labor, 471 U. S. 290, 302 (1985) ; Barrentine v. Arkansas-Best Freight. System, 450 U.S. 728, 740-741 (1981) ; Tennessee Coal Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602, (1944)

C. The Sixth Circuit's Decision in Aiken Does Not Aid the City; the City's Arguments Otherwise Lack Merit.

The City relies heavily upon the ruling in Aiken v. City of Memphis, 190 F.3d 753 6th Cir. 1999). There, a divided court ruled that a police employer was not required to pay overtime to one employee in order to permit another employee to use his or her accrued comp, time. The court based its holding on a memorandum of understanding between the union and the employer providing that comp. time may be requested up to 30 days in advance and that a supervisor may deny comp. time once a certain

number of officers have been granted leave for a particular day. 190 F.3d at 757.

Aiken held that the parties may define the meaning of "reasonable period" and that a memorandum of understanding between the employer and the union had done so there. The court upheld Inc. employer's position stating that "[w]e are loath to interfere with this agreement." 190 F.3d at 757. Here there is no comparable agreement. The CBA says nothing whatever about the specific terms on which comp. time may be denied. It says nothing about the mechanism that will be used to award or deny comp. time It does not provide any definition of "reasonable period" at all.

Further, in our view, Aiken was wrongly decided. Judge Ryan dissented from the majority's holding in Aiken, stating that the ruling "apparently is that if an officer doesn't make a request for comp. time early enough to assure that his replacement need not be paid time-and-a--half, then the officer will not have requested his time off within a reasonable period."As noted by the dissent, this conclusion improperly "conflates the concept of reasonable period within which the day off must be requested, and whether it is an undue disruption of the police department's operations to permit the time off to be taken.." 190 F.3d at 764. In Judge Ryan's view, the City's policy was prohibited by the Labor Department's declaration that it would not be an undue disruption for an employer to ask one employee to work overtime in order to grant another employee use of comp. time. Ibid.

The Secretary agrees with the approach taken by Judge Ryan. The majority in Aiken held that the "reasonable period" of time agreed to was the period from 30 days prior to the leave to the time that a sufficient number of officers requested leave for that day so that the staffing ratio fell below the minimum necessary for. efficient operation. 190 F.3d at 757. The majority's error was that the agreement between the parties did not relate to a "reasonable period" at all.fn3 By defining a reasonable period according to the minimum number of employees necessary for efficient operation, the city was actually making a determination as to when its services would be impaired. But the statutory standard for evaluating such an impairment of services is "unduly disrupt," and any denial of reasonably-noticed use of comp. time must meet that strict standard.

The Aiken majority's error is reflected in its acknowledgment of "some difficulty reconciling" the regulation at section 553.25(c)(2), which allows the parties to define "reasonable period," and the regulation at section 553.25(d), which prohibits the denial of a specific day of leave without an "undue disruption." 190 F.3d at 757 n.2.fn4 There is no inconsistency.The freedom of the parties to define the parameters of a reasonable notice period simply does not include the ability to create new justifications for denying the use of comp. time, thus reading "unduly disrupt" out of the statute.

Further, the decision in Aiken, by its own terms, does not support the City's apparent argument that an employer need never grant comp. time on the day requested by the employee, so long as it chooses a date

that falls within a reasonable period after the date: leave is requested. Aiken allows leave on the date requested, subject to certain conditions, without ever discussing an employer's ability to schedule leave for any day other than the day requested.

The City's argument is this regard strains the language of section 7(o). In providing that an employee shall be permitted to use comp. time "within a reasonable period after making the request, " Congress obviously intended to prescribe a minimum notice requirement, not a maximum time after the date of the leave request that comp. time may be used. The City's interpretation would actually result in a diminution of the notice requirement. If an employer only is required to provide leave within a reasonable period of the time it is requested, then an employee would have an incentive to ask for leave at the latest possible time, knowing that the employer is required to provide the leave within a reasonable period of the request. That can not be what Congress intended.

The City also attempts to draw support for its novel Statutory construction from the regulation at 29 C.F.R. 553.25 (c) (l) . That regulation defines "reasonable period" according to the agency's customary work practices which include the normal scheduling of work, anticipated peak workloads, emergency requirements and the like. These practices must be considered for the purpose of determining how much notice is reasonable, not, as the City argues, employee access to comp. time.

Finally, the FLSA "is to be liberally construed to apply to the furthest reaches consistent with Congressional direction." Walling v. National Ice & Fuel Corporation,

158 F.2d 28, 29 (7th Cir. 1946) ; Biggs v. Wilson,1 F.3d 1537, 1539 (9th Cir. 1993); Torme v. Kiekhaefer, Corporation, 76 F. Supp. 557, 558 (E.D. Wisc,. 1948). To that end, "FLSA exemptions are to be 'narrowly construed against . . . employers' and are to be withheld except as to persons 'plainly and unmistakably within their terms and spirit. ' " Auer,.519 U.S. at 462 (quoting Arnold v., Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960). Section 7(o), as a partial exemption to the FLSA's overtime requirements for public agency employees, should be narrowly construed against the employer asserting the exemption. See Moreau.v. Klevenhagen, 508 U.S. 22,33 (1993) (rejecting broad interpretation of 7 (o) that is in tension with the well-established rule that exemptions from the FLSA are to be narrowly construed) A strict construction of section 7(o) (5) requires rejection of the City's position that it need not give full force and effect to the "unduly disrupt" portion of the statute.

The City also asserts that a change in its comp. time policy would cause an "undue disruption." The Secretary has defined "undue disruption" of the operations of a public agency to mean "an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity." 29 C.F.R. 553.25 (d) . The City claims undue disruption of its operations by granting the use of accrued comp. time without having tried various operational alternatives, such as calling replacement officers from other shifts or from other divisions. This could be done without overtime hours being worked. In some cases, however, there may be no alternative to requiring an officer to work overtime hours so that another officer may utilize accrued comp. time, but the Secretary

reasonably has determined, consistent with legislative intent, that having to work overtime does not, by itself, amount to such a disruption. Indeed, this is particularly true where the City could pay the replacement officers in comp. time and not cash overtime wages. Congress recognized that only operational disruption, not payroll expense to the employer, could be a basis for denying an employee the use of accrued comp. time. Compare 29 U.S.C. 207 (o) (5) ("unduly disrupt the operations of the public agency") with 42 U.S.C. 12111(10) (Americans with Disabilities Act) ("undue hardship means are action requiring significant difficulty or expense"). Indeed, Congress recognized that if an agency had difficulty accommodating requests to use comp. time, it should cash out accomodating comp. time or pay cash overtime. It stated in House Report No. 99-331, at page 23:

Where public employers find that they cannot make requested time off available even outside of the periods of increased demand that all public service operations experience in the course of their business, they should consider allowing employees to cash out requested but unavailable compensatory time. For those employees where the problem of disruption is persistent, compensatory time should not be the preferred method of compensation for overtime work.

It must be noted in this context that the City has many areas of flexibility in meeting its personnel needs. For example, no overtime is owed to employees engaged in law enforcement unless they work more than 171 hours in a 28-day period, unlike most employees who earn overtime after 40 hours in week.

See 29 U.S.C. 207(a), (k) ; 29 C.F.R. 553.201(a) . Moreover, an employer may "cash out" an employees accrued camp. time at any time. 29 C.F.R. 553.27(a). Further, under its present system employees requesting comp. time compete on a first come, first served basis with employees requesting other types of leave. defendant's Proposed Findings of Fact, Nos. 36, 43. However, other. types of leave do not enjoy the statutory protection accorded to comp. time. It may be that providing a priority for comp. time reqests would add to the City's flexibility .

CONCLUSION

For the foregoing reasons, the Court should hold that the City's system for its employees' use of accrued compensatory time off is not consistent with the requirements of section 7(o)(5) of the Fair Labor Standards Act,

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Footnotes

fn1 29 C.F.R.553.23 provides,in pertinent part,that[t]he agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act.

fn2 1997 WL, 958635.

fn3 Under the court's construction, one employee could apply for leave 30 days prior to the date requested and be granted leave while another could make the same request for leave on the same day and be denied. Both employees would have requested leave during the same period, yet one would be deemed "reasonable" while the other would not.

fn4 The regulation at 29 C.F.R. 25(c) (2) provides that "to the extent that the conditions under which an employee can take compensatory time off are contained in an agreement or understanding, the terms of such agreement or understanding will govern the meaning of 'reasonable period.'" This regulation plainly allows the parties to determine the content of "reasonable period." However, it does not allow the parties to expand the scope of the term beyond its statutory meaning. See Barrentine, supra.

(2)

No. 04-1416

IN THE

Supreme Court of the United States

CITY OF CLEVELAND,
Petitioner,

v.

ROBERT M. BECK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the payment of overtime to a Cleveland police officer to cover a work shift of another officer who requests the use of earned compensatory time off constitutes "undu[e] disrupt[ion of] the operation of the public agency" within the meaning of Section 7(o)(5) of the Fair Labor Standards Act, 29 U.S.C. §207(o)(5), and the official regulations and interpretations promulgated by the U. S. Department of Labor.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, generally prohibits employment of more than forty hours in a work week without the payment of time-and-one-half of the employee's regular rate for any additional hours of work. In *Garcia v. San Antonio Metropolitan Transit Authority et al.*, 469 U.S. 528 (1985), the FLSA was made applicable to employees of state and local governments. Thereafter, the statute was amended to ameliorate the effects of *Garcia* by permitting these political entities to compensate employees with compensatory time ("comp time") or leave, rather than overtime pay, provided that the employer has an agreement with the employees to that effect. The 1985 amendments require that

> [a]n employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

> (A) who has accrued compensatory time off authorized to be provided under paragraph (1), and
>
> (B) who has requested the use of such compensatory time,
>
> shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. § 207(o)(5). The comp time exception to the required payment of overtime wages was intended "to provide flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours." H.R. Rep. No. 331, 99th Cong., 1st Sess. 19 (1985).

2. Congress expressly delegated to the Secretary of the United States Department of Labor the authority to promulgate regulations to implement the 1985 amendments. Pub. L. No. 99-150, § 6, 99 Stat. 790 (note to 29 U.S.C. § 203). The Secretary issued such regulations in 1987, defining the term "unduly disrupt" as follows:

> (d) *Unduly disrupt.* When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

29 C.F.R. § 553.25. In the explanatory notes to the regulations, the Secretary concluded that the payment of overtime

to an employee who substitutes for an employee using comp time does not constitute "undu[e] disrupt[ion]."

> The Department recognizes that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive.

52 Fed. Reg. 2012, 2017 (1987).

3. Consistent with its regulations, the Department of Labor has long held that the payment of overtime compensation to an employee in order to permit another to use earned compensatory time does not "unduly disrupt" operations. A 1994 Opinion Letter, issued by the Wage and Hour Administrator, reiterates the rule.

> It is our position . . . that an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive.

1994 WL 1004861 (DOL-WAGE-HOUR) (Aug. 19, 1994).

The Secretary also enunciated this interpretation in an *amicus* brief filed in *Debraska v. City of Milwaukee*, 131 F. Supp. 2d 1032 (E.D. Wisc. 2000). The Secretary urged the court to reject the assertion that the payment of overtime to a replacement constitutes undue disruption. The court agreed, noting that "Congress recognized that only operational disruption, not payroll expense to the employer, could be a basis for denying an employee the use of accrued comp time." *Id.* at 1036. The same result was reached in *Canney v.*

Brookline, 142 Lab. Cas. ¶ 34,169, 2000 WL 1612703 (D. Mass. 2000) and *Long Beach Police Assn. v. Luman*, 8 Wage & Hour Cas. 2nd (BNA) 1395, 2001 WL 1729693 (C.D. Cal. 2001).

4. In 1999, Robert Beck, President of the Cleveland Police Patrolmen's Association, and almost 1400 other past and present patrol officers employed by the City of Cleveland, Ohio, filed a complaint in the district court alleging that the City of Cleveland and the Cleveland Police Department were violating the FLSA in several respects, including the refusal to grant comp time off whenever doing so would result in the payment of overtime to the replacement officer. With respect to this systematic denial of the use of compensatory time,[1] the district judge held the payment of overtime to a replacement officer, in order for a patrol officer to use requested comp time, would constitute undue disruption under the FLSA. The court concluded that the statutory term "undue disruption" was unambiguous and, therefore, refused to defer to the official regulations and interpretations of the Department of Labor, which she found to be "unreasonable."

5. The court of appeals reversed the district court and remanded the case for further proceedings. The court found that "unduly disruptive" in the statute is "inherently ambiguous" and that, under *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), deference to the Secretary of Labor's interpretation of "unduly disrupt [was appropriate], especially where, as here, the regulation and its interpretation have been consistently applied since 1987." Pet., p. 15a. Based on the regulations, the interpretation, the *amicus* brief of the Secretary, and the opinions of the other

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[1] The Cleveland Police Patrolmen's Association and the city have entered into a series of collective bargaining agreements which permit the use of compensatory time off in lieu of overtime wages. Pet., p. 5a-7a.

courts which examined the issue, the court of appeals held that Cleveland's "systemic" refusal to honor a police officer's request to use comp time because it might have to pay a replacement overtime violates the statute.[2] *Id.* at 25a.

> In our view, invalidation of the Police Officers' statutory rights under Section 207(o)(5) requires a clear showing of the City's entitlement to the undue disruption exception to awards of accumulated compensatory leave. The Police Officers' compensatory leave requests must be granted absent "clear and affirmative evidence" [] of an undue disruption of the City's provision of police services for its citizens that is the controlling consideration under the "unduly disrupt" standard in Section 207(o)(5).

Id. at 28a (footnote omitted).

ARGUMENT

I. THERE IS NO CONFLICT AMONGST THE COURTS OF APPEALS TO WARRANT REVIEW

Petitioner contends (Pet. 8) that this Court should grant review to resolve a conflict among the circuits as to whether the payment of overtime compensation to a replacement employee, in order that another may use earned compensatory leave, constitutes "undu[e] disrupt[ion of the] operation of the public agency." 29 U.S.C. § 207(o)(5). There is, in fact, no conflict among the circuits on this question. Petitioner's claim that *Houston Police Officers' Union v. City of Houston*, 330 F.3d 298 (5th Cir. 2003), cert. denied, 540 U.S. 879

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[2] "[T]he record reveals that the controlling factor here is the financial consequences of granting the Police Officers' otherwise timely requests for compensatory leave." Pet., p. 24a. Because the district court had addressed only liability issues, the record does not yet reveal the number of comp time requests that were systematically denied on the basis of Cleveland's "policy [which is] not to allow compensatory time to be used if overtime is required." Pet., p. 6.

(2003), and *Mortensen v. City of Sacramento*, 368 F.3d 1082 (9th Cir. 2004), are at odds with the Sixth Circuit's decision in this case is plainly erroneous.

The question addressed both in *Houston* and *Mortensen* concerned the meaning of the statutory term "reasonable period," which is separately defined in the regulations.[3] Both courts rejected the position that an employer is required to grant the specific day off requested by the employee provided that the employee gives a "reasonable period" of notice of the request, and held that the employer may select a day off for the employee as long as the day falls within a "reasonable period" following the request. *Houston*, 330 F.3d at 303-04; *Mortensen*, 368 F.3d at 1084.[4]

By contrast, the "reasonable period" question decided in both *Houston* and *Mortensen* was not even an issue in the instant case. The district judge found (Pet. App. 62a) that there was no genuine dispute in this case with regard to the "reasonable period" standard, and the court of appeals held

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[3] An employee is entitled to use earned comp time "*within a reasonable period* after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5)(emphasis added).

[4] For the same reason, petitioner's reliance on *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999), cert. denied, 528 U.S. 1157 (2000), and *Scott v. City of New York*, 340 F. Supp. 2d 371 (S.D.N.Y. 2004), is equally misplaced. As with *Houston* and *Mortensen*, both cases address the "reasonable period" standard. For this reason, petitioner's repeated consternation about "employee choice" of a day off and "employer flexibility" as to the day off—concepts admittedly at issue in the "reasonable period" cases—has no application to the separate "undu[e] disrupt[ion]" standard upheld by the court of appeals in this case.

The Fifth and Ninth Circuit decisions contain only a passing reference to the term "unduly disrupt" and that is simply because the term is part of the same statutory section as the term "reasonable period." Neither court ruled on whether the payment of overtime to a replacement employee constitutes "undu[e] disrupt[ion]" within the meaning of the Act.

that the clause "is not as [*sic*] issue in this appeal." Pet., p. 25a. Rather, the issue here was "whether, upon the proof presented, the City's denial of its police officers' *timely* requests for use of their accrued compensatory leave, to avoid payment of substitute officers at overtime rates, is appropriate under Section 207(o)(5)'s *undue disruption* rule." Pet., p. 9a-10a (emphasis added).

Thus, Petitioner's rhetoric notwithstanding, there is no conflict in the circuits on the issue decided in this case. As a result, there is no occasion for review by this Court.

II. THE COURT OF APPEALS PROPERLY DEFERRED TO THE REGULATIONS

In *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), this Court held that § 207(o)(5) "imposes a restriction upon an employer's efforts to *prohibit* the use of compensatory time when employees request to do so. . . ." (Emphasis in original.) When Congress enacted this "restriction," it required a public employer to grant an employee's request to use earned comp time "within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5). As noted, Congress expressly delegated to the Secretary the authority to issue regulations to define the phrase "unduly disrupt the operations of the public agency." The regulations require that an agency "reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services" to deny an employee's request to use earned comp leave. 29 C.F.R. § 553.25. The Secretary added that the payment of overtime to a replacement employee in order that another may use comp time does not constitute "undu[e] disrupt[ion]." *Supra* at 2.

It is well established that "the framework of deference set forth in *Chevron* does apply to an agency interpretation

contained in a regulation." *Christensen*, at 587. Indeed, an agency's interpretations are entitled to deference "when the language of the regulation is ambiguous," but even without such ambiguity the interpretation is "'entitled to respect.'" *Id.*, at 587-88.

In this case, the regulations and the Secretary's consistent interpretations are firmly rooted in the legislative history of the 1985 amendments. The House Report notes that an employee's request to use comp time "should be honored unless to do so would be unduly disruptive," H.R. Rep. No. 99-331, at 23 (1985), and the Senate Report teaches that governmental operations lie at the epicenter of the "unduly disrupt[ive]" test.[5]

> By "unduly disruptive," the committee means something more than mere inconvenience. For example, a request by a snow plow operator in Maine to use 40 hours of comp time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June would not be unduly disruptive.

Senate Report No. 99-159, 1985 U.S.C.A.N. 651, 660 (1985).

The court of appeals considered the legislative history, regulations and interpretations, including the Secretary's *amicus* position in *Debraska*, to determine whether the payment of overtime, if necessary, to a substituting officer was "unduly disrupt[ive]" within the meaning of the statute.[6]

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[5] "[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill. . . ." *Garcia v. U.S.*, 469 U.S. 70, 76 (1984).

[6] As the court noted in *Debraska*, it is not always necessary to *pay* a substitute—whether in overtime wages or comp time—in order to grant an employee's request to use comp time. If employees are able to switch days off, change shifts, be called in from other divisions, or if the em-

Collectively, these pronouncements have a common refrain: the payment of overtime to a replacement cannot *per se* defeat an employer's obligation to grant an employee's request to use earned compensatory leave. After all, the statutory scheme of the FLSA makes it clear that comp time belongs to the employee, and that an employee is entitled to its timely use unless the employer can clearly demonstrate that the utilization of the leave would "unduly disrupt governmental *operations*." 29 U.S.C. § 207(o)(5)(emphasis added). The Secretary squarely addressed this issue, and the court of appeals properly deferred to that ruling under *Chevron*.

Furthermore, the decision below is in harmony with the uniform view of the other courts that have considered the issue. *Debraska*, *supra*; *Canney*, *supra*; *Long Beach*, *supra*. In each instance, the courts held that the phrase "unduly disrupt" in § 207(o)(5) requires proof of undue disruption of governmental *operations* and services, and that the payment of overtime wages to an employee in order that another may take earned comp leave does not constitute "undu[e] disrupt[ion]" of the agency's operations.

Finally, petitioner's effort to portray the court of appeals decision as establishing an "*ex post facto*" (Pet. 29) requirement to pay overtime is disingenuous. After all, the Labor Department declared, not long after the adoption of the 1985 amendments, that payment of overtime to a replacement employee would not constitute "undu[e] disrupt[ion]" under the FLSA. The statute does not require comp time agreements. A public employer that concludes it would be less costly to pay overtime pay than to credit employees with comp time need not enter into a comp time agreement.

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ployer can simply leave an employee's shift uncovered, there may be fewer situations even to inquire about undue disruption. 131 F. Supp. 2d at 1037.

But Cleveland *did* enter into such an agreement. As a result, the only relevant consideration under the FLSA is whether the City can clearly demonstrate a disruption of operations and services from an employee's use of comp time. This is precisely the question that the court of appeals has remanded to the trial court to examine. Indeed, the posture of this proceeding serves to underscore the impropriety of the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

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